

FTA-OH-26-0001-94-1



U.S. Department
of Transportation

Federal Transit
Administration

Implementation Guidelines for Drug and Alcohol Regulations in Mass Transit

April 1994



Office of Safety and Security

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16. Abstract <p>These guidelines will assist transit agencies in developing drug and alcohol testing programs that satisfy regulations of the Federal Transit Administration (FTA). These regulations were published in the <i>Federal Register</i> on February 15, 1994, as <i>Prevention of Prohibited Drug Use in Transit Operations</i> (49 CFR part 653) and <i>Prevention of Alcohol Misuse in Transit Operations</i> (49 CFR part 654). These guidelines are directed to transit agencies receiving Federal funding under sections 3, 9, and 18 of the Federal Transit Act and section 103(e)(4) of title 23 of the U.S. Code. These guidelines will assist State agencies that receive FTA funding and contractors who perform certain services for transit agencies. All of these types of organizations are subject to the regulations.</p> <p>These guidelines will also assist transit agencies to comply with requirements of <i>Procedures for Transportation Workplace Drug and Alcohol Testing Programs</i> (49 CFR part 40) and <i>The Drug-Free Workplace Act</i> (49 CFR part 29).</p> <p>The guidelines are organized by the key steps that transit agencies must take in establishing and operating successful drug and alcohol programs. These include Policy Development and Communication, Training, Types of Testing, Testing Procedures, and Administrative Requirements.</p> <p>The pertinent regulations are cross-referenced throughout the text and are reprinted in their entirety in Appendix I. Forms, checklists, and lists of additional information and services are provided throughout the document.</p>			
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METRIC/ENGLISH CONVERSION FACTORS

ENGLISH TO METRIC

LENGTH (APPROXIMATE)

1 inch (in) = 2.5 centimeters (cm)
 1 foot (ft) = 30 centimeters (cm)
 1 yard (yd) = 0.9 meter (m)
 1 mile (mi) = 1.6 kilometers (km)

AREA (APPROXIMATE)

1 square inch (sq in, in²) = 6.5 square centimeters (cm²)
 1 square foot (sq ft, ft²) = 0.09 square meter (m²)
 1 square yard (sq yd, yd²) = 0.8 square meter (m²)
 1 square mile (sq mi, mi²) = 2.6 square kilometers (km²)
 1 acre = 0.4 hectares (he) = 4,000 square meters (m²)

MASS - WEIGHT (APPROXIMATE)

1 ounce (oz) = 28 grams (gr)
 1 pound (lb) = .45 kilogram (kg)
 1 short ton = 2,000 pounds (lb) = 0.9 tonne (t)

VOLUME (APPROXIMATE)

1 teaspoon (tsp) = 5 milliliters (ml)
 1 tablespoon (tbsp) = 15 milliliters (ml)
 1 fluid ounce (fl oz) = 30 milliliters (ml)
 1 cup (c) = 0.24 liter (l)
 1 pint (pt) = 0.47 liter (l)
 1 quart (qt) = 0.96 liter (l)
 1 gallon (gal) = 3.8 liters (l)
 1 cubic foot (cu ft, ft³) = 0.03 cubic meter (m³)
 1 cubic yard (cu yd, yd³) = 0.76 cubic meter (m³)

TEMPERATURE (EXACT)

$$[(x - 32)(5/9)]^{\circ}\text{F} = y^{\circ}\text{C}$$

METRIC TO ENGLISH

LENGTH (APPROXIMATE)

1 millimeter (mm) = 0.04 inch (in)
 1 centimeter (cm) = 0.4 inch (in)
 1 meter (m) = 3.3 feet (ft)
 1 meter (m) = 1.1 yards (yd)
 1 kilometer (km) = 0.6 mile (mi)

AREA (APPROXIMATE)

1 square centimeter (cm²) = 0.16 square inch (sq in, in²)
 1 square meter (m²) = 1.2 square yards (sq yd, yd²)
 1 square kilometer (km²) = 0.4 square mile (sq mi, mi²)
 1 hectare (he) = 10,000 square meters (m²) = 2.5 acres

MASS - WEIGHT (APPROXIMATE)

1 gram (gr) = 0.036 ounce (oz)
 1 kilogram (kg) = 2.2 pounds (lb)
 1 tonne (t) = 1,000 kilograms (kg) = 1.1 short tons

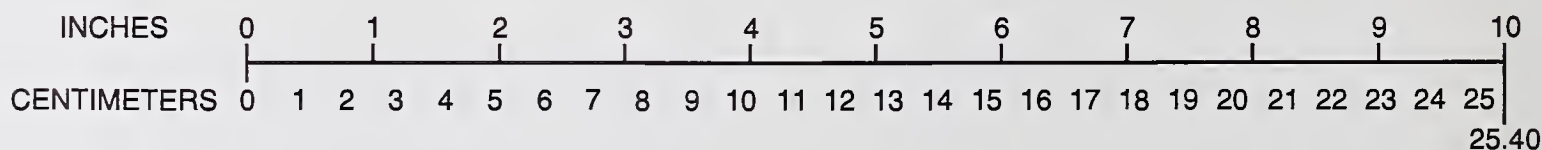
VOLUME (APPROXIMATE)

1 milliliter (ml) = 0.03 fluid ounce (oz)
 1 liter (l) = 2.1 pints (pt)
 1 liter (l) = 1.06 quarts (qt)
 1 liter (l) = 0.26 gallon (gal)
 1 cubic meter (m³) = 36 cubic feet (cu ft, ft³)
 1 cubic meter (m³) = 1.3 cubic yards (cu yd, yd³)

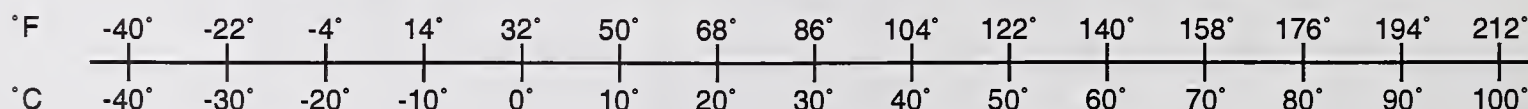
TEMPERATURE (EXACT)

$$[(9/5)y + 32]^{\circ}\text{C} = x^{\circ}\text{F}$$

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QUICK FAHRENHEIT-CELCIUS TEMPERATURE CONVERSION



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Chapter 1.

INTRODUCTION

Section 1. PURPOSE AND SCOPE OF THESE GUIDELINES

The Federal Transit Administration (FTA)* recognizes that prohibited drug use and alcohol misuse affect everyone in the United States in one way or another. In response to passage of the Omnibus Transportation Employee Testing Act of 1991,

the FTA has published two regulations prohibiting drug use and alcohol misuse by transit employees and requiring transit agencies to test for prohibited drug use and alcohol misuse. These regulations are 49 CFR part 653, "Prevention of Prohibited Drug Use in Transit Operations," and 49 CFR part 654, "Prevention of Alcohol Misuse in Transit Operations." In addition, the Department of Transportation (DOT) has issued 49 CFR part 40, "Procedures for Transportation Workplace Drug and Alcohol Testing Programs", which prescribes testing methods to be followed. Complete copies of the regulations are located in Appendix I.

* The Intermodal Surface Transportation Efficiency Act of 1991 changed the name of the Urban Mass Transportation Administration (UMTA) to the Federal Transit Administration (FTA).

To assist transit agencies in implementing those regulations, the FTA has developed these guidelines. The ultimate goal, for the FTA and the U.S. transit industry, is to achieve a drug- and alcohol-free work force in the interest of the health and safety of employees and the public.

These guidelines are written as if a transit agency has no established drug and alcohol program and will guide agencies in developing such programs based upon the FTA and DOT rules. At the same time, these guidelines will help agencies modify drug and alcohol programs already in place to comply with FTA and DOT regulations. These guidelines provide a logical sequence for implementing the various elements of a

successful program and contain examples of documents, checklists, forms, and procedures that may be used by individual transit systems in formulating their programs. The following required elements of a drug and alcohol program are discussed:

- Policy and procedure development
- Employee and supervisor education and training
- Specimen collection and testing
- Recordkeeping and reporting.

Transit agencies may go beyond these requirements to incorporate additional features (such as Employee Assistance Programs and rehabilitation options) that are not mandated by FTA regulations. However, you must make clear that any additional features are not part of the FTA-mandated program and will be conducted under the authority of the transit agency, not the FTA. For example, if you test for drugs other than the specific five that the FTA requires, you must make the employees aware that they are being tested for those additional drugs under the authority of the transit agency, not FTA, and you must collect separate specimens for analysis.

These drug and alcohol program requirements must be implemented on January 1, 1995, for large operators and on January 1, 1996, for small operators (§653.13 and 654.15). This requirement applies to all Section 3, 9, and 18 recipients (§653.5 and 654.3).



Any transit agency that operates primarily in an urban area of 200,000 people or more (as defined by the Bureau of Census) is considered a large operator. Any transit agency that operates primarily in an urban area of less than 200,000 people is considered a small operator (§653.7, 654.7). These definitions are unaffected by the size of the transit agency, the number of vehicles in the fleet, or the number of employees.

Section 2. HOW TO USE THESE GUIDELINES

These guidelines are a ready reference for those in the transit industry who must formulate and implement programs to control substance abuse. They are organized by subject, and each subject is addressed in the general order that it would be confronted in the actual formulation and implementation of a drug and alcohol program.

Each major subject is discussed in a separate section. Sample documents, forms, and checklists are provided in the Sample Documentation section at the end of each chapter. These materials were designed to meet the minimum regulatory requirements contained in 49 CFR parts 40, 653, and 654.

Material in the appendices amplifies basic information in the text, identifies additional resources or references, and provides specific detailed information on subjects that may be ancillary to the guidelines or applicable only to certain situations or transit operations. You may want to read

Appendix H, Terms and Definitions, first if you are unfamiliar with some of the language used.

In certain cases, the information in this document goes beyond the regulatory minimum and covers additional aspects of a substance abuse management program considered helpful in developing a comprehensive and defensible program. It is the option of each transit agency to implement a drug and alcohol program that goes beyond the regulatory minimum.

These guidelines do not take precedence over or alter any requirement established under FTA or DOT regulations. To assist you in differentiating between program elements required by regulation and optional suggestions for maximizing program effectiveness, certain key words are used throughout the text.

Regulatory Text

Statements in this manual that refer to **regulatory requirements** contain the words “**shall**” or “**must**” (e.g., “A substance abuse management program shall include a policy statement...”). Program elements **not** explicitly **required** by regulations, but suggested as an integral part of successful implementation are generally addressed using the word “**should.**” **Optional** elements, or those program features that have several acceptable alternatives, are normally expressed by use of the word “**may.**”

Section numbers from the regulations are also used to more clearly define regulatory requirements. For example, §653.7

means this regulation is specifically mentioned in 49 CFR part 653, section 7; and, in a similar manner, §40.25 references 49 CFR part 40, section 25.

To clarify some of the more difficult issues and provide some practical guidance on how other transit systems have dealt with many of these issues, we have provided "best practice" stories periodically throughout these guidelines. These best practices are not required methods of implementation; they are only examples of how some systems have dealt with particularly difficult issues.

Best Practices

Know the Regulations

In one transit agency, the program manager read and re-read the regulations several times. He also participated in every conference, workshop, and information meeting on the subject that was available and asked questions of other transit system program managers, State Department of Transportation staff, the FTA Office of Safety and Security Staff, as well as other people in the community that had knowledge of the subject. With each new reading, questions, or discussion, subtleties of the regulation were uncovered and new or differing interpretations were found. The process was ongoing and required a certain degree of tenacity. The upfront effort to know the regulations resulted in a virtually problem-free implementation.

Section 3. OTHER RESOURCES

While every attempt has been made to make these guidelines as complete and self-supporting as possible, additional published material is available. For instance, Chapter 6, "Types of Testing," provides a discussion on the random testing portion of your drug and alcohol program; but a separate manual, the *Random Drug Testing Manual*, has been published by the FTA to provide detailed guidance on how to implement a comprehensive and defensible random drug testing program as part of an overall substance abuse management program. Where appropriate, these additional resources are identified.

The Sample Documentation section at the end of this chapter contains a list of sources of additional information that you may wish to acquire as you begin developing your substance abuse management program.

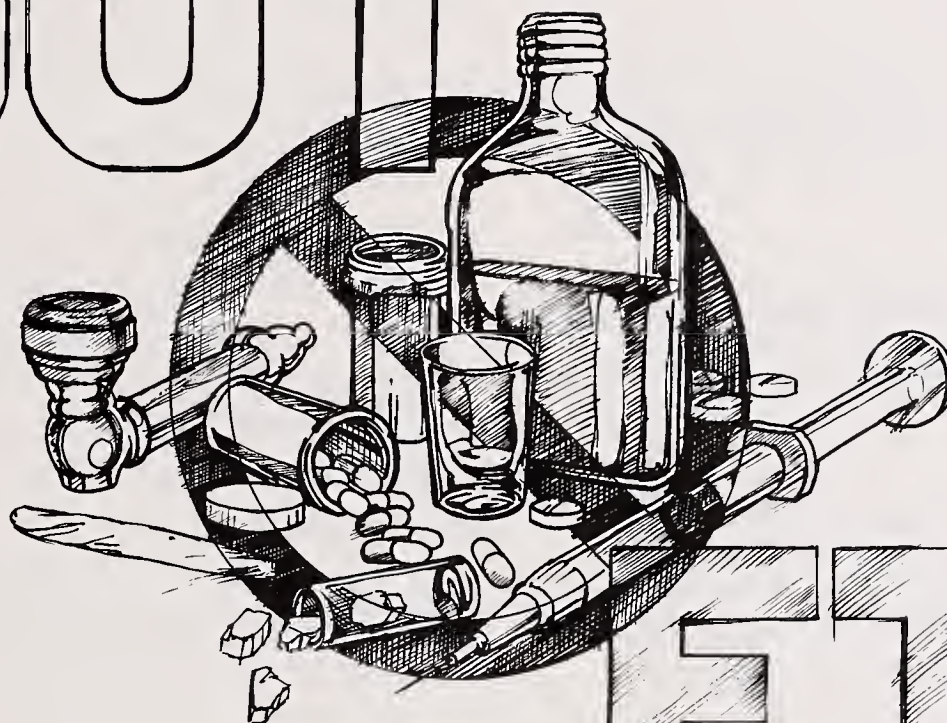
As a result of the evolving nature of drug and alcohol testing, it may be necessary to revise or update these guidelines at some point in the future. Please fill out the registration card, found in the front of this publication, to ensure that you receive all updates to these guidelines. If you want additional copies of these guidelines, you can reproduce as many copies as you need.

Sample Documentation

SOURCES OF ADDITIONAL INFORMATION AND OTHER PUBLISHED DOCUMENTATION

Documentation	Source
<i>Random Drug Testing Manual</i>	Office of Safety & Security Federal Transit Administration 400 Seventh Street, S.W., Room 6432 Washington, DC 20590
<i>Substance Abuse in the Transit Industry</i>	
<i>Employee Assistance Program for Transit Systems</i>	
<i>Reasonable Cause Training Module</i>	Betty Dennis (to order) Battelle 505 King Avenue Columbus OH 43201 Phone: 614-424-4103 Fax: 614-424-5069 Gayle DeGennaro (for questions) Battelle 505 King Avenue Columbus OH 43201 Phone: 614-424-3625 Fax: 614-424-5069
<i>Drug Testing Procedures Handbook</i>	U.S. Dept. of Transportation Office of Drug Enforcement and Program Compliance 400 Seventh Street, S.W., Room 9404A Washington, DC 20590 (202) 366-DRUG
<i>Drug & Alcohol Abuse Prevention and the ADA: An Employer's Guide</i>	The Institute for a Drug-Free Workplace East Tower Suite 1010 1301 K Street, N.W., East Tower Washington, DC 20005 Phone: (202) 842-7400 Fax: (202) 842-0011

DOT



FTA

Chapter 2. **REGULATORY** **OVERVIEW**

Implementing the FTA-required drug and alcohol program may require you to modify existing substance abuse policies and programs or, in some cases, develop entirely new programs. The critical program elements will be drug and alcohol testing of employees and applicants for employment in positions that require the performance of safety-sensitive functions.

It is in this context that you must formulate drug and alcohol policies, communicate them to your employees, and conduct drug and alcohol testing. The goals of these activities are to enhance worker productivity and safety and ensure positive acceptance of the program. In keeping with the stated objective of enhancing productivity and safety, you are encouraged to make your drug and alcohol program an integral part of your overall system safety program plan.

Section 1. WHAT THE REGULATIONS REQUIRE

The FTA regulations require that the following program elements be implemented:

- A policy statement on drug use and alcohol misuse in the workplace (see Chapter 4, "Policy Development and Communication")
- An employee (for drug program only) and supervisor education and training program (see Chapter 5, "Training")
- A prohibited drug and alcohol testing program for employees and applicants for employment in safety-sensitive positions (see Chapters 6, "Types of Testing," 7, "Drug Testing Procedures," and 8, "Alcohol Testing Procedures")
- Evaluation of the employee who has violated the drug and alcohol regulations (see Chapters 7, "Drug Testing Procedures," and 8, "Alcohol Testing Procedures")
- Administrative procedures for recordkeeping, reporting, releasing information, and certifying compliance (see Chapter 9, "Administrative Requirements").

Who Must Participate?

Any recipient of Federal financial assistance under Sections 3, 9, or 18 of the Federal Transit Act, as amended; or any recipient of Federal financial assistance under Section 103(e)(4) of title 23 of the United States Code must comply with these regula-

tions (§653.5 and §654.3). Generally, these are transit agencies that receive FTA funding and State agencies that assist in distributing FTA funding to transit agencies. Section 16(b)(2) operators that do not receive any Section 3, 9, or 18 funding are exempt from the FTA drug and alcohol regulations but may be covered by the Federal Highway Administration's drug and alcohol testing regulation.

Some transit agencies could be affected by drug and alcohol testing regulations of more than one U.S. DOT modal agency. These include transit agencies operating ferry boats, commuter railroads, or vehicles that require operators to hold Commercial Driver's Licenses (CDLs). In those cases, the FTA has coordinated responsibility with the other modal agencies to minimize overlapping requirements.

Sample letters of certification for these various instances are included in the Sample Documentation section at the end of this chapter.

Violations

Throughout this document, you will see references to "violations" of or "violating" the regulations. These terms will refer to any safety-sensitive employee who has

- A verified positive drug test
- An alcohol concentration of 0.04 or greater
- Refused to submit to a test.

U.S. Coast Guard. The U.S. Coast Guard and the FTA have agreed that transit agencies that operate ferry boats and receive FTA funds must comply with the FTA's and the U.S. Coast Guard's testing regulations. However, the Coast Guard substance abuse regulations encompass sanctions and other ramifications not included in the FTA drug and alcohol regulations that might be applied to individual marine employees. Those entities covered by both FTA and Coast Guard regulations are encouraged to consult 33 CFR part 95 and 46 CFR parts 4, 5, and 16.

Federal Railroad Administration. The Federal Railroad Administration (FRA) and FTA have agreed that commuter railroad operators that receive FTA funds are exempt from compliance with the FTA's testing regulations. However, these operators must certify to the FTA that they are in full compliance with the FRA substance abuse regulations. A sample certification letter can be found in the Sample Documentation at the end of this chapter (§653.83 and 654.83).

Commercial Driver's Licenses. The Federal Highway Administration (FHWA) and the FTA have agreed that transit agencies with safety-sensitive employees holding CDLs are covered by the FTA drug and alcohol regulations.

Since the FTA regulations apply only to recipients of Section 3, 9, or 18 funding, or any recipient of Federal financial assistance under Section 103(e)(4) of title 23 of the U.S. Code, those operators receiving only Section 16(b)(2) funding are not

required to comply with the FTA testing regulations. However, those Section 16 recipients who have drivers holding CDLs may have to comply with the FHWA's drug and alcohol testing programs.

What Employees are Affected?

Employees who perform safety-sensitive functions must be included in the substance abuse management program (§653.3 and 654.1).

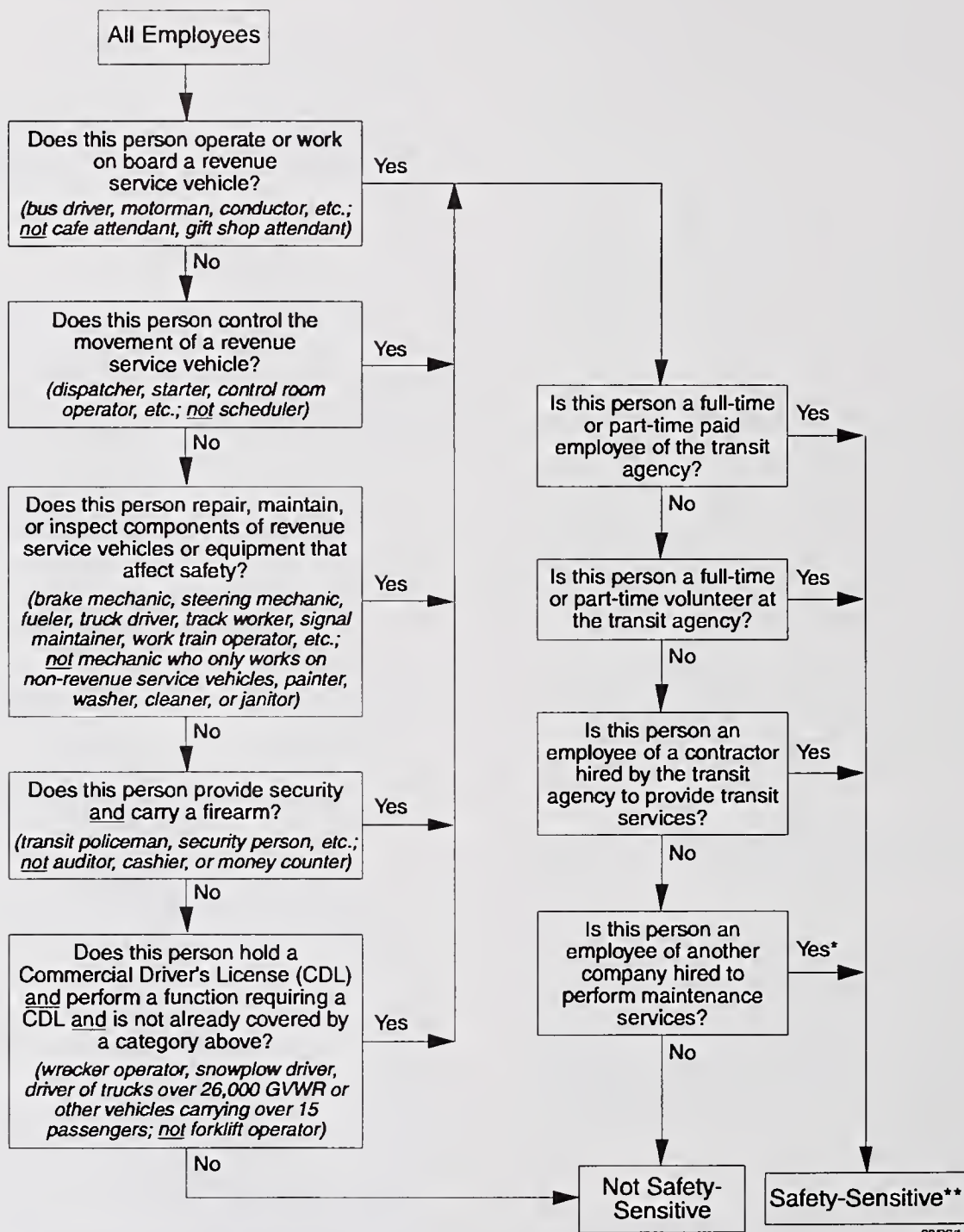
The FTA has determined that "safety-sensitive" functions are performed by those who (§653.7 and 654.7)

- Operate revenue service vehicles including when not in revenue service
- Operate nonrevenue service vehicles that require drivers to hold CDLs
- Dispatch or control revenue service vehicles
- Maintain revenue service vehicles or equipment used in revenue service except for contractors to Section 18 transit agencies
- Provide security and carry a firearm.

These categories include supervisors who perform these functions. Supervisors of employees in these categories but who do not themselves perform these functions are excluded.

Figure 2-1 shows a process you can follow to determine whether an employee performs a safety-sensitive function. Figure 2-2 further details the categories of employees considered safety-sensitive.

Figure 2-1. Safety-Sensitive Employee Sieve



* Except vehicle maintenance employees of companies performing service for Section 18 transit agencies

**Supervisors who perform safety-sensitive functions are also included

Figure 2-2. Safety-Sensitive Employee Matrix

Safety-sensitive employees or volunteers are those who...	Definition	Examples of employees to include	Examples of employees to exclude	Section 15 Labor Category #	Section 15, Form 404 Line #
Operate revenue service vehicles	Person operating or working as a crewman on revenue service vehicles at any time	<ul style="list-style-type: none"> • Bus driver • Motorman • Conductor • Yard driver 	<ul style="list-style-type: none"> • Gift shop attendant • Cafe attendant 	031	02
Dispatch or control revenue service vehicles	Person controlling movement of revenue service vehicles	<ul style="list-style-type: none"> • Dispatcher • Starter • Tower operator 	<ul style="list-style-type: none"> • Scheduler 	012	01
Maintain revenue service vehicles or other equipment used in revenue service	Person repairing and maintaining revenue service vehicles or other equipment used in revenue service	<ul style="list-style-type: none"> • Mechanic • Fueler • Wheelchair lift repairman • Work train operator • Track worker • Truck driver (vehicles over 26,000 GVWR) • Signal maintainer 	<ul style="list-style-type: none"> • Mechanic (who only works on non-revenue service vehicles) • Painter • Washer • Janitor • Cleaner 	051* 061* 062* 071* 081* 091* 101* 121* 122* 123* 124* 126* 141*	05 06
Provide security and carry a firearm	Person who provides security to protect persons or property	<ul style="list-style-type: none"> • Transit police officer • Security personnel who carry firearms 	<ul style="list-style-type: none"> • Auditor • Cashier • Security personnel who do not carry firearms 	151 161	03 04
Hold a Commercial Driver's License (CDL)	Any other transit employee who holds a CDL <u>and</u> performs a function requiring a CDL <u>and</u> not already covered by a category above	<ul style="list-style-type: none"> • Wrecker operator • Snowplow driver • Drivers of trucks over 26,000 GVWR or other vehicles carrying over 15 persons 	<ul style="list-style-type: none"> • Forklift operator 	051* 061* 062* 071* 081* 091* 101* 121* 122* 123* 124* 126* 141*	05 06

* These labor classifications may relate to several categories of safety-sensitive employees.

Notes: Section 15 reports are filed annually by Section 3 and 9 transit operators. These cross-references are provided to assist you in identifying any safety-sensitive employees.

Contractors who provide maintenance service to Section 18 transit agencies are exempted from compliance. Examples include mechanics at commercial garages who maintain or repair transit vehicles and service station attendants who fuel transit vehicles.

Supervisors who perform safety-sensitive functions are included.



Best Practices

Determine Who is Safety-Sensitive

A transit system has several employee job classifications that, on the surface, do not appear to be safety-sensitive (i.e., secretary, bus washer, general manager). However, a system should not rely on job titles, but rather consider the actual job functions that each employee is performing when determining the safety-sensitive status of each employee. In this case, a secretary fills in for a dispatcher during lunch breaks, the bus washer drives the revenue service vehicles from the storage area to the wash bay, and the general manager occasionally switches out vehicles in an emergency situation. Given the small size of the system, cross-training of staff, and the need for all employees to occasionally fill in for others, all the system employees are safety-sensitive.

Policy Statement

You must adopt a policy statement on substance abuse in the workplace (§653.25, 654.71). Among other items, the policy must

- Identify which categories of employees are subject to testing
- Describe prohibited behavior
- Describe testing procedures
- Describe consequences for violating the drug and alcohol regulations.

A detailed discussion on the specific requirements of the drug and alcohol program policy statement is provided later in Chapter 4, "Policy Development and Communication."

Education and Training

You must provide educational materials that explain the requirements of the FTA drug and alcohol testing regulations (§653.29, 654.73) and your policies and procedures with respect to meeting these requirements to all safety-sensitive employees. Information on the effects and consequences of substance abuse on personal health, safety, and the work site, as well as indicators of substance abuse, must be provided.

Supervisors must receive additional training on the physical, behavioral, and performance indicators of substance abuse if they are responsible for determining when subordinates must be tested. Chapter 5, "Training," provides greater detail on the training requirements for employees and supervisors.

Testing

You must establish a drug (§653.31) and alcohol (§654 subpart C) testing program that follows FTA regulations for drug testing (Chapter 7, "Drug Testing Procedures") and alcohol testing (Chapter 8, "Alcohol Testing Procedures"). The types of tests are

- Pre-employment
- Reasonable suspicion
- Post-accident
- Random
- Return to duty
- Follow-up.

In addition to these six types of testing, transit systems also must perform blind sample testing for their drug testing program as a quality assurance measure for the testing laboratory (§40.31). Each of these tests is described in detail in Chapter 6, "Types of Testing."

Administrative Requirements

You must maintain certain testing records (§653.71, 654.51). Such records and other personal data associated with the testing program are subject to certain conditions for release. Annual reports must be submitted to FTA to summarize the results of testing (§653.73, 654.53). You must certify compliance with the regulations each year (§653.83, 654.83). Further discussion of the administrative requirements associated with these regulations is found in Chapter 9, "Administrative Requirements."

State and Local Issues

The FTA regulations (§653.9, 654.9) preempt any State or local law, rule, regulation, or order when

- Compliance with both the State or local requirement and these regulations is not possible; or
- Compliance with the State or local requirement is an obstacle to accomplishing and executing any requirement of these regulations.

However, these regulations do not preempt any provisions of State criminal law that impose sanctions for reckless conduct

leading to loss of life, injury, or damage to property.

Section 2. WHAT THE REGULATIONS DO NOT REQUIRE

The FTA regulations are focused on public safety and, therefore, do not address a number of concerns that are considered internal affairs of individual transit agencies. Some of the issues that are **not** specifically included in the FTA regulations are that

- The FTA does not require testing of nonsafety-sensitive employees (although you may choose to do so under your own separate authority).
- The FTA does not require that you provide an Employee Assistance Program (EAP) (although you may and are encouraged to do so).
- The FTA does not require that employees be rehabilitated and reinstated (although you may do so).

You may expand upon the regulatory requirements to tailor a program to meet specific needs. However, your policy should be very specific about what activities are conducted under Federal regulations and what activities are conducted under your system's own authority.

Going Beyond the Regulatory Requirements

Whenever you expand your drug and alcohol program beyond the regulatory

requirements and include aspects not specifically required by the regulations, you must make sure that the employee is aware which parts are FTA regulatory requirements and which are your own extensions beyond the regulation. For example, if you wish to test nonsafety-sensitive employees, you may do this under your own authority but must establish a separate testing pool of those employees.

Testing for Other Substances

Although FTA regulations only require urine testing for five specified drugs and breath testing for alcohol, you may wish to include other substances that may be prevalent in your local area. Most testing laboratories offer urine testing protocols for dozens of drugs including a panel of nine typical "drugs of abuse" (amphetamines, cocaine, marijuana, opiates, phencyclidine, methadone, methaqualone, barbiturates, and benzodiazepines). If you wish to test for other than the five drugs specified by the regulation, you must collect a *separate* urine specimen and notify the employee that the test is not being conducted under the requirements of the FTA regulation. The testing must be kept separate to ensure that the integrity of the FTA-mandated tests is in no way compromised.

Providing an Employee Assistance Program

Should you choose to provide an Employee Assistance Program, it may be provided by the employer, by a health care provider under contract with the employer, or by a health care provider not affiliated

with the employer. However, this is not required by the FTA regulations. The availability of an EAP should be noted in the policy statement.

Section 3. THE CONSEQUENCES OF FAILURE TO COMPLY

Failure to certify compliance with the FTA regulations will result in the suspension of your system's eligibility for FTA funding.

If a State certifies compliance on behalf of a transit system, then the State is responsible to ensure that the system is complying with the requirements of the regulations. A Section 3, 9, or 18 subrecipient, through the administering State, is subject to suspension of funding from the State (§653.81, 654.81).

Sample Documentation

Certification of Compliance for FTA Recipients

(certifying compliance with 49 CFR part 653 and part 654)

Date _____

Address of Your FTA
Regional Office

I, _____, _____,
(Name) (Title)

certify that _____ and its contractors, as required, for
(Name of Recipient)

_____, has established and implemented an anti-drug and alco-
(Name of Recipient)

hol misuse prevention program(s) in accordance with the terms of 49 CFR part 653 and part 654. I further certify that the employee training conducted under this part meets the requirements of 49 CFR part 653 and part 654.

Sincerely,

(Name)
(Title)

Certification of Compliance for States

(certifying compliance on behalf of its subrecipients and contractors
with 49 CFR part 653 and part 654)

Date _____

Address of Your FTA
Regional Office

I, _____, _____,
(Name) (Title)

on behalf of _____, certify that the entities on the attached list
(State)

of FTA subrecipients operating in this State, have established and implemented anti-drug and
alcohol misuse prevention programs in accordance with the terms of 49 CFR part 653 and 654.

Sincerely,

(Name)
(Title)

Certification of Compliance for FTA Recipients Regulated by the FRA

(certifying compliance with 49 CFR part 653 and part 654)

Date _____

Address of Your FTA
Regional Office

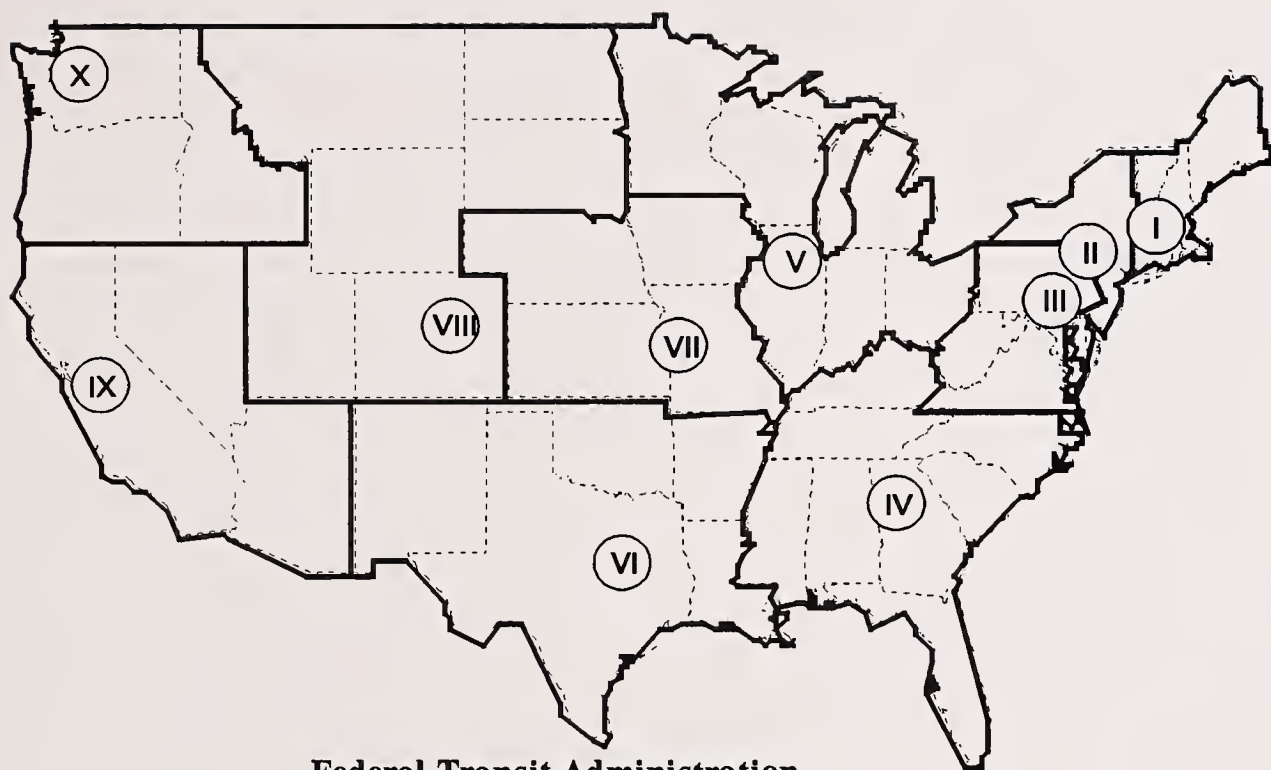
I, _____, _____,
(Name) (Title)

certify that _____ and its contractors, as required, for _____,
(Name of Recipient) (Name of Recipient)

has an anti-drug program that meets the requirements of the Federal Railroad Administration's regulations for employees regulated by the Federal Railroad Administration, and has established and implemented an anti-drug and alcohol misuse prevention program in accordance with the terms of 49 CFR parts 653 and 654 for all other covered employees who perform safety-sensitive functions.

Sincerely,

(Name)
(Title)



**Federal Transit Administration
Regional Offices**
(As of September 17, 1993)

- | | |
|---|--|
| <p>I Suite 920
Kendall Square
55 Broadway
Cambridge, MA 02142-1093
(617) 494-2055</p> | <p>VI Suite 1752
524 East Lamar Boulevard
Arlington, Texas 76011-3900
(817) 860-9663</p> |
| <p>II Suite 2940
26 Federal Plaza
New York, NY 10278-0194
(212) 264-8162</p> | <p>VII Suite 303
6301 Rockhill Road
Kansas City, MO 64131-1117
(816) 523-0204</p> |
| <p>III Suite 500
1760 Market Street
Philadelphia, PA 19103-4124
(215) 656-6900</p> | <p>VIII Suite 650, Columbine Place
216 Sixteenth Street
Denver, CO 80202-5120
(303) 844-3242</p> |
| <p>IV Suite 400
1720 Peachtree Road, N.W.
Atlanta, GA 30309-2439
(404) 347-3948</p> | <p>IX Room 1160
211 Main Street
San Francisco, CA 94105-1926
(415) 744-3133</p> |
| <p>V Suite 1415
55 East Monroe Street
Chicago, IL 60603-5704
(312) 353-2789</p> | <p>X Jackson Federal Building
Suite 3142
915 Second Avenue
Seattle, WA 98174-1002
(206) 220-7954</p> |

Chapter 3.

PROGRAM FORMULATION



The first step in establishing a comprehensive drug and alcohol program is to identify and assemble key personnel who will be responsible for developing and implementing your program.

The early involvement of transit management, employees, and labor organizations and their continued involvement throughout the implementation process ensure that all critical concerns are addressed and improve the chances for acceptance and support of the program. The program should be presented in a positive, proactive manner as the product of a visible agency-wide effort.

Section 1. TASK TEAM

A task team should be formed and given responsibility for formulating policy and implementing your drug and alcohol program, with management guidance and approval. The composition of the task team will depend on the size of your organization. If possible, representatives from each of the following disciplines should be included: management, legal, medical, personnel, operations, maintenance, and labor relations. If you presently have an Employee Assistance Program (EAP), the coordinator should also participate on the team.

In small systems the team should also include a driver and/or a maintenance employee at a minimum. Small systems that are part of a City or County department may also wish to include representatives from the Personnel Department and Legal Counsel. In addition to the task team coordinator, the team in larger systems should include one representative from each bargaining unit, and at least one employee representative from the general work population.

Program Manager. The transit system's drug and alcohol program manager (PM) should act as the task team leader. The PM should be knowledgeable about the transit system's operations, human resources, and drug and alcohol program and will be ultimately responsible for the formation, implementation, and day-to-day management of the program. It would be very beneficial for the PM to have sufficient authority to direct the program. The PM

must have easy access to senior management, union representatives, and first-line workers.

Task Team Responsibilities. The primary responsibility of the task team will be to develop an action plan for accomplishing the program's goals and objectives, thereby ensuring the successful implementation of the program. The action plan will include the identification of implementation tasks, the assignment of individual responsibilities for task completion, the development of a flowchart that depicts the relationship among tasks, and the development of a corresponding time schedule.

Other duties of the task team may include

- Assisting in the resolution of local policy issues
- Providing input into the development of a substance abuse management policy
- Establishing roles and responsibilities of individuals responsible for developing procedures for the transit system's substance abuse management program
- Identifying and evaluating any local, regional, or State-wide assistance programs, testing pools, consortia, or other programs that may be beneficial to the transit system
- Providing input into procurement of equipment and contract services for specimen collection, laboratory testing, medical review officer services, breath alcohol technicians,

and substance abuse professionals and/or consortia

- Assisting in the conduct of employee awareness and supervisor training
- Assisting in the implementation and evaluation of the overall substance abuse management program.

Best Practices

Positive Approach

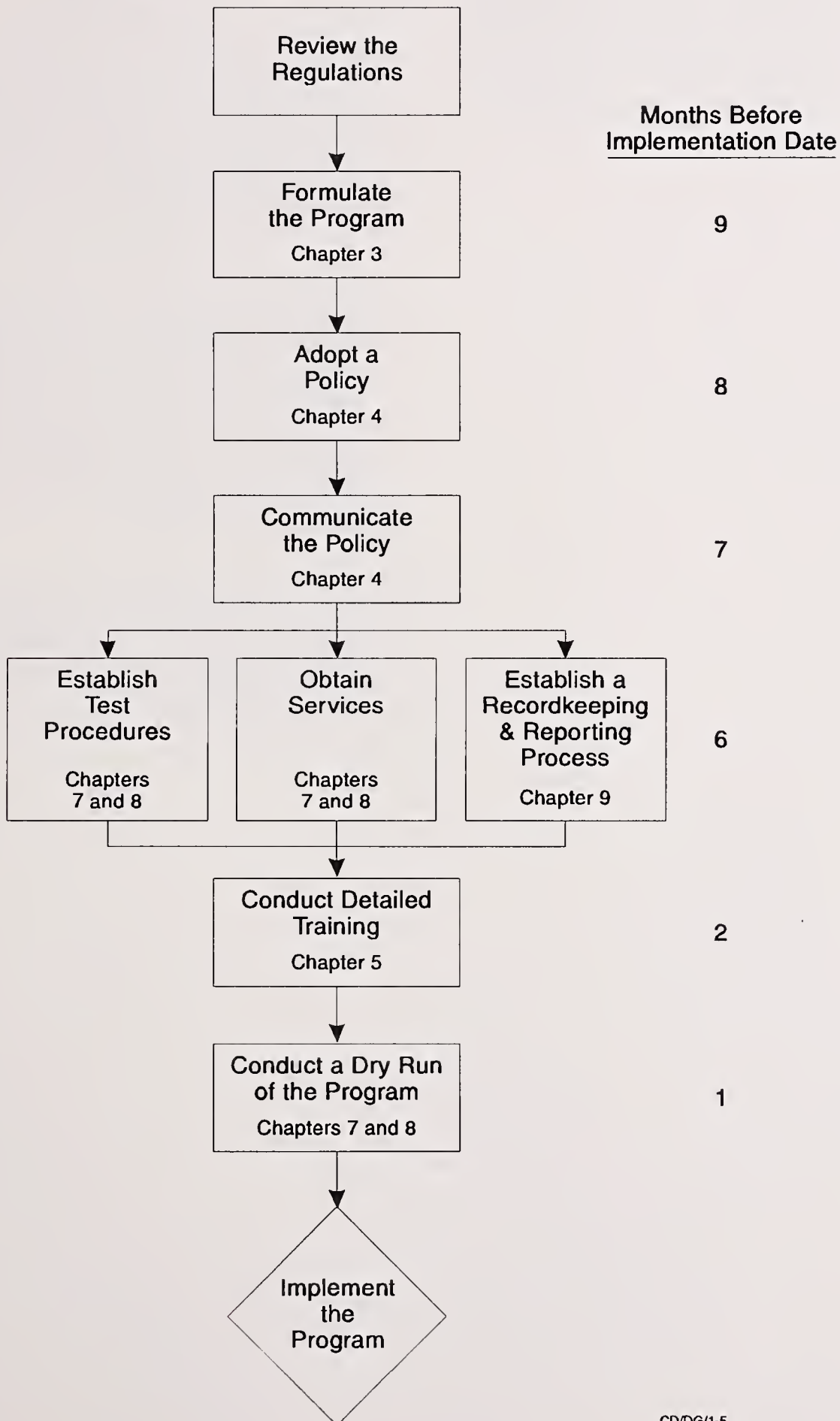
The transit system management and board recognized that the implementation of a comprehensive drug and alcohol program would be a great benefit to their employees. A good program would improve public safety, employee safety, and employee morale. In addition, the program would deter prohibited drug use and alcohol misuse, and would provide a mechanism to identify and help those employees with substance abuse problems. When presented in this positive manner, the program was accepted with little opposition from the employees or union.

Section 2. ACTION PLAN

You must implement your program on January 1, 1995, if you operate primarily in an urban area of 200,000 people or more (large operator). If the urban area you primarily serve is less than 200,000 people (small operator), you must implement your program on January 1, 1996 (§653.13, 654.15).

The actual time that a system will need to prepare its program will vary depending on the local circumstances and current status of its substance abuse management program. Additional time may be required if

Figure 3-1. Suggested Schedule for Critical Activities



your current substance abuse management program is inconsistent with the FTA regulations or if labor/management issues are unresolved. Figure 3-1 shows a suggested schedule for implementing your program.

Best Practices

Getting Union Support

A Regional Transit Authority has had a drug testing program in place since 1986. The Authority has enjoyed excellent relations with its various unions and enjoys union support because the union was included in the program formulation.

Because management recognized the need for union and employee "ownership" of the program, the union was advised of the program formulation from the beginning. Working closely with the Transit Authority's task team, the union was afforded the opportunity to tour the selected laboratory and was instrumental in the selection of the Medical Review Officer.

This close relationship, which developed from policy formulation to program implementation, allowed the Transit Authority to have its anti-drug program approved by its unions in five months.



Chapter 4.

POLICY DEVELOPMENT AND COMMUNICATION

The FTA regulations require that you develop written policies on prohibited drug use and alcohol misuse in the workplace and that they be provided to every safety-sensitive employee. You should develop a consolidated policy addressing both drugs and alcohol. You should use this chapter as a checklist of the items that should be included in your policy. Since your policy

should also reflect components of the Drug-Free Workplace Act and the Americans with Disabilities Act (ADA), you should review Chapter 13, "Drug-Free Workplace Act," and Appendix C, "ADA Discussion."

Section 1. POLICY DEVELOPMENT

The program manager should guide the development of the initial draft policy. The task team members should review the draft and provide comments.

A final review of the draft policy should be conducted by your legal representative and by your labor relations or personnel officer. The purpose of the legal review is to ensure that there are no conflicts between the provisions of the policy, and the requirements of FTA. The pre-emption provision of the FTA rule must be observed (see Chapter 2, "Regulatory Overview," Section 1).

The labor relations/personnel review should identify and resolve any conflicts between the policy and existing labor agreements or personnel policies. It should be noted that requirements of the FTA regulations are not subject to bargaining. You should allocate sufficient time for this review and approval and should notify your governing board early in the process of policy development that its approval will be sought. The final policy statement must receive formal approval by your governing board (§653.23, 654.71).

Section 2. REQUIRED POLICY STATEMENT

The drug and alcohol regulations require that you have a policy statement that incorporates your position and information on virtually all aspects of your drug and alcohol program.

Overview

The policy statement should begin with a short statement describing the objective or purpose of the policy.

Policy Component	Required in the	
	Drug Rule (§653.25)	Alcohol Rule (§654.71)
Overview		
Employee categories subject to testing	X	X
Participation as a requirement of employment	X	X
Required hours of compliance		X
Prohibited behavior	X	X
Circumstances for testing	X	X
Behavior that constitutes a refusal to submit to a test	X	X
Testing procedures	X	X
Consequences of use of drugs and misuse of alcohol	X	X
Identity of contact person	X	X
Effects of alcohol		X
Additional (optional) provisions	X	X
Approval by governing board	X	X

Employee Categories Subject to Testing

All employees and volunteers who perform safety-sensitive functions must be subject to the testing provisions set forth in the FTA regulations. Each agency should attach to its policy a list of the safety-sensitive job functions and corresponding position titles to clearly identify which

employees are specifically covered (see Chapter 2, "Regulatory Overview," for safety-sensitive definition).

Participation as a Requirement of Employment

The policy should indicate that participation in the agency's prohibited substance testing program is a requirement of each safety-sensitive employee and, therefore, is a condition of employment.

Required Hours of Compliance

The policy must clearly identify the time periods during which safety-sensitive employees must be in compliance with the alcohol rule. An employee must not consume alcohol while performing a safety-sensitive function (§654.23), four hours prior to performing safety-sensitive function (§654.25), and up to eight hours following an accident or until the employee undergoes a post-accident test, whichever occurs first (§654.27).

Use and ingestion of prohibited drugs are prohibited at all times.

Prohibited Behavior

Employers must specify the employee behaviors that are prohibited by the FTA rules. In addition, the policy must prohibit any employee from engaging in unlawfully manufacturing, distributing, dispensing, possessing, or using controlled substances in the workplace consistent with the Drug-Free Workplace Act of 1988.

Circumstances for Testing

The FTA requires that drug and alcohol tests be given to safety-sensitive employees in specific circumstances: pre-employment, reasonable suspicion, post-accident, random, return to duty, and follow-up (see Chapter 6, "Types of Testing," for description of these tests).

Your policy must define these circumstances in sufficient detail to inform the safety-sensitive employee what circumstances will trigger these tests.

Behavior that Constitutes a Refusal to Submit to a Test

The policy must describe the kinds of behavior that constitute a refusal, which include: refusal to take the test, inability to provide sufficient quantities of breath or urine to be tested without a valid medical explanation, tampering with or attempting to adulterate the specimen or collection procedure, not reporting to the collection site in the time allotted, or leaving the scene of an accident without a valid reason before the tests have been conducted.

Testing Procedures

The policy must describe the procedures (49 CFR part 40) on how the

- Drug and alcohol tests will be performed
- Privacy of the employee will be protected

- Integrity of the test process will be maintained
- Test results will be attributed to the correct safety-sensitive employee.

The policy should indicate that the employer will strictly adhere to all standards of confidentiality and assure all employees that testing records and results will be released only to those authorized by the FTA rules to receive such information.

Consequences of the Use of Drugs and the Misuse of Alcohol

The policy must contain the consequences for a safety-sensitive employee who refuses to submit to a test, has a verified positive drug test result, has an alcohol concentration of 0.04 or greater or has an alcohol concentration of 0.02 or greater but less than 0.04. This includes the mandatory requirement that such a safety-sensitive employee be removed immediately from his or her safety-sensitive function. The policy must also state that any safety-sensitive employee who has a verified positive drug test result, an alcohol concentration of 0.04 or greater, or refuses to submit to a test must also be evaluated by a Substance Abuse Professional.

Any further action (e.g., termination) taken against the employee is up to the transit agency but must be described in detail in the policy. It should also be mentioned in the policy that these actions are transit agency-mandated, not FTA-mandated.

Identity of Contact Person

You must identify a person to answer questions about the drug and alcohol program, with the telephone number and office location clearly indicated. The contact person could be the drug and alcohol program manager.

Effects of Alcohol

The policy must include a discussion of the effects of alcohol misuse on an individual's health, work, and personal life; signs and symptoms of an alcohol problem; and available methods of intervening when an alcohol problem is suspected.

Any Additional Employer Provisions

If you wish to exceed the requirements of the Federal regulations, these provisions should be included in the policy. It should be made clear that these provisions are those of the transit system and not required by the FTA.

Section 3. POLICY COMMUNICATION

Once you have developed and adopted a policy on prohibited drug use and alcohol misuse prevention, you must make sure that employees are aware of the policy and the effect it will have on them. You must provide materials that explain the regulations, the policy, and the corresponding procedures to each safety-sensitive employee and representatives of employee organizations (§653.27, 654.71). A sample

Best Practices

Developing a Policy Statement

One transit system formed a task team composed of transit system management, City personnel director, City legal counsel, contract maintenance service provider, director of public works, and employee representatives. The personnel director served as the task team leader. A draft policy was developed using the City's existing policy, a sample model policy statement, and the FTA rules. A draft policy was created and supplied to task team members for comment. Changes were made and a compliance review was conducted to ensure that revisions were consistent with the FTA requirements. The policy was modified accordingly and, after a final review, was adopted by the City Commission.



The requirement to notify safety-sensitive employees about your policy should not be confused with the requirement to formally train certain employees and supervisors in selected aspects of your drug and alcohol program. See Chapter 5, "Training," for an explanation of your training obligations.

Program Notification letter that satisfies this requirement is provided in the Sample Documentation section of this chapter.

However, you may wish to exceed this requirement by undertaking a more proactive approach to communicating the policy by using all the mechanisms available at your organization to inform and educate employees. These could include

- Orientation sessions
- Written materials
- Interactive forums
- Informational material displays
- Ongoing dialogue among safety-sensitive employees, labor representatives, first-line supervisors, and management.

Orientation for Current Employees

As soon as the policy is adopted, initial policy communication sessions should be scheduled to inform the employees and volunteers of the requirements of the Federal regulations and the manner in which the transit system will implement these regulations. This initial communication should be in a session of approximately 60 minutes. A senior management representative should be present and express support for the policy. However, if a session cannot be scheduled, you could distribute the policy to all employees, explaining some of the major points of the program and the

implementation schedule. In the initial communication you should

- Provide each employee with a copy of the policy and explain that formal training on the details of the program will follow. Summarize the policy.
- Provide a summary that explains the requirements set forth in the regulations.
- Have each employee sign a "Confirmation of Receipt" form acknowledging receipt of a copy of the policy and the regulation summary. An example form is provided at the end of this section. If in a classroom, have each employee sign an attendance roster and maintain a list of all employees who have been briefed.
- Provide an overview of the transit system's action plan for implementing the substance abuse policy and discuss the major milestones.
- Provide a schedule, consistent with your action plan, of the formal employee training sessions. At this point, you should be prepared to schedule and sign up all employees for their formal training sessions.

You may wish to include other items in your initial policy orientation sessions. One suggestion is to provide an open forum where top management, union officials, laboratory representatives, and/or a substance abuse professional may answer questions regarding any aspect of the policy, its implications, testing procedures, or available employee assistance. Be sure that persons answering questions about the pol-

icy and regulations are completely knowledgeable concerning all aspects of the program. Generalities, vague answers, opinions, and guesses should be avoided. If a specific issue has not been resolved or is not addressed by the policy, say so. If you do not know the answer to a question, assure the audience that you will get an answer as soon as possible, then make sure to follow up.

Remember that a subsequent, more detailed training session will follow. The initial session should be an orientation to what has already occurred and what is yet to come.

Management Commitment

Top management should demonstrate its personal commitment and support of the program by communicating the policy to employees, setting an example, and ensuring fair and impartial implementation. Management assurances of strict confidentiality and respect for employee privacy and dignity are key elements in promoting the program. As such, senior transit officials should have been thoroughly briefed on the program and must be knowledgeable about the effects of substance abuse, the various rehabilitation options available (if any), and the prescribed disciplinary actions. A positive attitude toward achieving a drug- and alcohol-free work site should be communicated at every opportunity and will do much to achieve a successful program.

Labor Involvement

Implementation of the FTA-mandated drug and alcohol program is not subject to bargaining, unless the transit agency chooses not to accept FTA funding. However, it is advantageous to involve the union or employee leadership in the implementation process by inviting employee representatives to participate on the task team and by providing periodic briefings on the status of program formulation. The briefings should stress the health and safety benefits to the transit system and employees. Your employee representatives may actively support the drug and alcohol program and may offer to become actively involved in it or in the support and administration of the EAP.

Applicants for Employment

You must make sure that all safety-sensitive applicants are fully aware of the transit system's commitment to a drug- and alcohol-free workplace. A statement similar to the one below should be added to all notices of safety-sensitive positions:

The (Transit Agency) has established the goal of a 100 percent drug- and alcohol-free workplace. Applicants will be required to undergo drug and alcohol testing prior to employment and will be subject to further drug and alcohol testing throughout their period of employment.

In addition, a statement should be added to the employee application form in which the prospective employee agrees to

Best Practices

Communicating

Two transit systems have been particularly effective in communicating their programs. Both approaches to communication stress the safety aspects of the programs. One system published a summary of the policy in the system's newsletter. It then held staff meetings at the department level. These sessions lasted two hours and gave the employees the opportunity to express their concerns and to ask questions about the policy and the program. Following the department level meetings, the General Manager (GM) met with groups of employees both on and off the premises. Employees were permitted to express their remaining concerns and ask their remaining questions, this time of the GM. Because some employees might be concerned that by speaking out they would somehow be targeted by the program, employees were allowed to write questions on 3" x 5" cards and submit them in advance or anonymously and have them answered. Finally, the responses to the questions were published in the system newsletter as a means of ongoing education regarding the program.

While the other transit system's communication activities were not quite this extensive, the system benefits from healthy labor/management relations and from unions that recognize the contribution that drug and alcohol control programs can make to safety. Because of this, monthly union meetings devote 15 to 20 minutes to the drug abuse policy and program, and to members' concerns either about the program or about drug usage itself.

follow the transit system's drug and alcohol policy and submit to drug and alcohol testing if performing a safety-sensitive function. Current employees who wish to transfer to a safety-sensitive function must be made aware of these policies. Further details on pre-employment testing are found in "Types of Testing" (Chapter 6) of these guidelines.

In addition to these pre-employment statements, as part of their orientation, applicants who submit to and pass the pre-employment drug and alcohol tests should be given a briefing similar to that given current employees and must be given a copy of the policy statement.



Contract Service Provider Notification

The FTA rules require that each recipient certify that it complies with the require-

ments of the regulations. If a recipient uses a contract service provider or maintenance provider, these contractors must also be in compliance. Contract maintenance personnel who work for Section 18 operators are excluded from these regulations.

Since the regulation covers those contract personnel who are "standing in the shoes of" the transit system safety-sensitive employees, it is the responsibility of the recipient to ensure that contract organizations comply with the regulations. The safety-sensitive functions covered for contract personnel include the same duties as the recipient's own safety-sensitive employees. These employees may be full- or part-time workers or volunteers of the contractor.

You should notify all contract service and maintenance providers of the regulatory requirements and the need for them to comply with the minimum requirements. The notification should be made in writing and explained in an orientation session similar to that held for transit system employees. In the orientation you should

- Provide each contractor with a copy of the regulatory requirements and the transit system's policy statement, including a description of the program's intent and implications.
- Have each contractor sign a "Confirmation of Receipt" form acknowledging receipt of a copy of the policy and the regulations.
- If desired, invite the contractor to participate in the transit system's testing and training program.

- If your contract service safety-sensitive employees are not included in your program with your own employees, provide the contractor with a list of consortia that can provide the contractor with the necessary services to ensure that the contractor is in compliance.
- Inform contractors of the record-keeping and reporting requirements and your intent to monitor compliance.

It is your responsibility to ensure and certify that your contractors are in compliance and to file your contractor's annual MIS Reports with FTA.

As necessary, the transit system should work with each contractor to modify existing contracts to incorporate its policy provisions. All future bids or Requests for Proposals for safety-sensitive functions should include a statement regarding the required compliance with the FTA regulations.

Ongoing Awareness Program

Over time, interest in the program will invariably fade as the program becomes incorporated into the routine operating procedures of the system. However, under the Drug-Free Workplace Act, efforts must be made to ensure that the drug-free message is ever-present at the transit system.

The same should hold true for alcohol awareness as well. This ongoing awareness should be reinforced during training, periodic safety meetings, and continuing dialogue between management and employees, as well as through displays, bulletin board announcements, and informational pamphlets to serve as reminders and reinforce the key points of the entire policy.

Best Practices

A Rapid Transit District with an employee pool of over 8,000 safety-sensitive employees has had a drug and alcohol testing program in place since 1985.

The drug and alcohol policy was developed by a task team including representatives from legal, facilities, management, and district employees. After the policy was formulated, the unions were advised of its contents.

The policy was given to employees who were required to sign for receipt six months before the program was to be implemented. The policy provided for a few hours of employee orientation and 4 to 8 hours of supervisory training.

The Transit District provides access to an EAP and the opportunity for employees to obtain help on their own.

The success of the program can be seen by the decline of positive test results from 20 percent in 1985 to less than one percent in 1992.

Sample Documentation

Confirmation of Receipt

ACKNOWLEDGMENT

I have received a copy of _____ drug and alcohol policies and procedures.
(Transit Agency)

Date

Employee's Signature

Employee's Name (Printed)

Please sign and return this card.

Sample Program Notification Letter

Dear (Safety-Sensitive Employee) or (Union Representative):

The Federal Transit Administration has recently issued two new regulations entitled, *Prevention of Prohibited Drug Use in Transit Operations* (49 CFR part 653), and *Prevention of Alcohol Misuse in Transit Operations* (49 CFR part 654). (Transit Agency) is required to comply with these regulations. Under these regulations, we must issue a policy prohibiting prohibited drug use at all times by our safety-sensitive employees. In addition, alcohol consumption by our safety-sensitive employees is prohibited while performing, and for four (4) hours prior to performing safety-sensitive functions. Alcohol use after an accident is also prohibited. We must also conduct tests to determine in six specific situations whether employees have used alcohol or drugs. The procedures and technology we will employ in this testing are specified in a Department of Transportation regulation, *Procedures for Transportation Workplace Drug and Alcohol Testing Programs* (49 CFR part 40).

The regulations are very specific regarding what (Transit Agency) must do to comply. We have developed a policy and procedures that will apply to you based upon the job functions you perform at (Transit Agency). To help you and your representatives better understand our policy and procedures, the following information will be available at all times in the (General Manager's/Legal/Labor Relations/Human Resources/Medical) Office:

1. Contact person
2. Safety-sensitive employee categories
3. When employees are required to be in compliance
4. Prohibited behavior
5. Circumstances when employee is tested
6. Testing procedures
7. Mandatory testing requirement for safety-sensitive functions
8. Consequences of refusing to submit to a test
9. Consequences of a verified positive drug test result
10. Consequences of an alcohol concentration of 0.04 or greater
11. Consequences of an alcohol concentration of 0.02 or greater and less than 0.04
12. Information concerning the effects of alcohol misuse.

This program will begin on (Date of Implementation).

Thank you very much for your cooperation in implementing these important new safety regulations. If you have any questions regarding the regulations or (Transit Agency's) policy and procedures, please contact (Name of Contact Person) at (Telephone Number of Contact Person).

Very truly yours,

General Manager

Enclosure(s)



Chapter 5. TRAINING

Training and educating your work force and supervisors are major components of a successful drug and alcohol program. The benefits of the program are enhanced when your employees and supervisors understand your policies and procedures, why you are implementing them, and what their responsibilities are.

Well-trained employees and supervisors help you achieve your safety goals and maintain program integrity, which in turn reduce your program costs and liabilities. The FTA regulations require specific train-

ing for safety-sensitive employees and their supervisors.

The requirements with which you must comply are summarized in the Sample Documentation section of this chapter. The regulations do not require you to provide any education or training for non-safety-sensitive employees or for supervisors who will not be determining when to administer a reasonable suspicion test (unless they themselves are safety-sensitive employees).

Section 1. TRAINING FOR SAFETY-SENSITIVE EMPLOYEES

While the education and training requirements are similar for both the alcohol and drug programs, there are subtle differences. Under both programs, you must notify the safety-sensitive employees that you have a policy and procedures requiring alcohol and drug testing under certain conditions. *The regulations (§653.27, 654.71) also require you to provide copies of the information regarding your drug and alcohol program to all safety-sensitive employees.*

The Sample Documentation section in Chapter 4, "Policy Development and Communication," contains a sample letter of notification that you may modify for notifying safety-sensitive employees. Because the regulations *require* you to provide copies of policy and procedures, the notification letter specifies that they are attached as an enclosure to the letter.

Some transit agencies have employees sign indicating that they have received a copy of the policy. Others include a copy with each safety-sensitive employee's paycheck. You should have a record that each employee has been notified of the policy (§654.51(c)(6)(ii)).

Training for current employees should occur before the time of program inception. Since you may have new employees entering your work force in the future, you should make sure that copies of your drug

and alcohol program notification and education materials are included in materials provided to new employees by your personnel department. If you choose to have current employees sign for receipt of the policy, make sure that your personnel department obtains a receipt from new hires.

Receipts for educational materials, if you require them, should be filed in personnel files.

You must display and distribute additional information regarding your prohibited drug use policy and program

(§653.29). In addition, you must *display* and *distribute* informational material about the effects of drugs. You must also display and distribute a community service hotline telephone number to help employees who may be experiencing problems with prohibited drugs.

Although the alcohol rule does not require you to *display* information regarding your alcohol misuse program, you should display it along with your prohibited drug use program information. *You must provide educational materials that explain the requirements of the FTA's alcohol rule and your policies and procedures (§654.71).*

Training safety-sensitive employees is not a requirement of the alcohol regulation. However, information concerning the effects of alcohol misuse on the individual's health, work, and personal life and signs and symptoms of an alcohol problem (the employee's or a coworker's) must be provided (§654.71).

Appendix F to these guidelines includes information about drug and alcohol use that you may wish to incorporate into educational and informational materials. Suggested other sources of information are shown in Figure 5-1.

If you provide an Employee Assistance Program (EAP), the EAP should be able to provide you with informational and educational materials. In fact, your contract may require the EAP to supply and distribute the materials. Similarly, your health insurance carrier may have informational and educational materials available to distribute to your work force.

A community service hotline telephone number may be available through a number of sources (see Figure 5-2). If you cannot locate a local number, there are several national hotline numbers that you should provide to your employees. Some of these

numbers are toll-free. In most cases, these national organizations can direct your employees to local services, including services for those without insurance coverage.

You must train all safety-sensitive employees on the effects of drug use and indicators of drug use (§653.29). Training means more than simply providing written materials for the individual's personal use. Typically, training will be offered in a group setting with an instructor. It may, however, make use of interactive technologies without a live instructor.

The regulation specifies a minimum of 60 minutes for drug training for safety-sensitive employees. Because of the volume of information that must be covered, some transit agencies may find two hours to be a more appropriate training period.

Figure 5-1. Suggested Sources for Informational Materials

1. *National Clearinghouse for Alcohol and Drug Information (NCADI), PO Box 2345, Rockville, MD 20852. (800) 729-6686 or (301) 468-2600. Can provide fact sheets, films, posters, pamphlets, and brochures at no or low cost. Multilingual materials. Free quarterly catalog available.*
2. *Your State substance abuse clearinghouse. Each State has at least one Federally funded clearinghouse, which can provide you with nationally and locally produced information materials.*
3. *Drug-Free Workplace Helpline, Center for Substance Abuse Prevention. (800) 843-4971. Operates from 9:00 AM to 8:00 PM Eastern time, Monday - Friday. Provides information on policy, drug testing, employee assistance program models, and related topics. Offers literature at no cost to employers. Referrals to other information sources and lists of consultants by geographic area are available.*
4. *Partnership for a Drug Free America, 405 Lexington Avenue, New York, NY 10174-0002. (212) 922-1560. Provides high quality, high impact messages in the form of posters, audio tapes, and video tapes. No charge, but a donation will be requested.*

Figure 5-2. Sources of Community Service Hotline Telephone Numbers

1. *American Council on Alcoholism Helpline—(800) 356-9996*
2. *National Cocaine Hotline—(800) COCAINE or (800) 662-HELP*
3. *National Council on Alcoholism and Drug Dependence Hope Line—(800) NCA-CALL*
4. *National Institute on Drug Abuse Hotline—(800) 662-HELP*
5. *Alcoholics Anonymous—(800) 870-3795*
6. *Narcotics Anonymous—see local directory*
7. *Local United Way*
8. *National Directory of Drug Abuse and Alcoholism Treatment and Prevention Programs. Directory published by the U.S. Public Health Service, Rockville, MD.*
9. *Your State alcohol and drug abuse clearinghouse*
10. *Your State alcohol and drug abuse agency(ies)*
11. *Yellow pages directory under “Social Service Agencies”*
12. *Your municipal government Department of Social Services, or equivalent*

You must train safety-sensitive employees on the effects and consequences of prohibited drug use on personal health, safety, and the work environment. You must also train them on the manifestations and behavioral cues that may indicate prohibited use.

To make the training more meaningful, you should present the information in the context of prohibited drug use in the workplace, the FTA regulation, and your company policy.

Section 2. TRAINING FOR SUPERVISORS

You must provide additional specific training to supervisors who will be determining when it is appropriate to administer reasonable suspicion drug or alcohol tests. Supervisors play a critical role in administering the substance abuse management program policies and are responsible for maintaining safety and productivity. Supervisors must determine when an employee's behavior or appearance provides “reasonable suspicion” that the employee has used or consumed prohibited drugs or alcohol in conflict with the FTA's regulations. A determination of reasonable suspicion

Best Practices

Ongoing Substance Abuse Awareness Training

A State Department of Transportation sponsored the development of a substance abuse awareness training program designed specifically for transit system employees. The program was designed to be taught in a classroom situation for group training sessions or to be used as a self-instructional tool for individualized instruction for new hires. The program was also designed in a modular format to allow initial or refresher coverage of individual topics at periodic meetings or all at once in a two- to three-hour period. The program emphasized the implications of prohibited drug use and alcohol misuse on the ability of transit professionals to do their jobs. In addition to the instructional materials, the program included an array of collateral materials that were designed to be used as ongoing reminders of the training and the overall drug- and alcohol-free transit program. The collateral materials included posters and payroll stuffers and pens, key chains, lapel pins, and coffee mugs with the logo and slogan.

requires that a drug and/or alcohol test must be administered.

Amount of Training

You must provide 60 minutes of supervisory training for the alcohol program (§654.75) and 60 minutes for the drug program (§653.29). A total of 120 minutes is required. Because the supervisor's performance is critical to the success of your substance abuse management program, some transit agencies devote a full day to supervisory training.

Training Agenda

A proposed agenda for supervisory training can be found in the Sample Documentation section. The agenda is fully compliant with the regulations and assumes that the alcohol and drug program training will be conducted concurrently. Elements of the training that are not specifically required by the regulations, but which will improve training effectiveness, include introducing the context (this will be a review of instruction received in the safety-sensitive employee training) and reviewing the program and disciplinary procedures, confrontation and documentation procedures, and rehabilitation and treatment options, if any exist. Your supervisors should understand all of these topics to administer your program effectively.

To help you prepare your training sessions, Appendix F of these guidelines contains descriptions of the effects and behavioral indicators of substance abuse.

Reasonable Suspicion Determination

Supervisors who make reasonable suspicion determinations must have training on the physical, behavioral, and performance indicators of probable drug use and alcohol misuse.

In addition to understanding when to fulfill this responsibility, the supervisor should understand why it is important and how to fulfill the responsibility. Because only one supervisor's opinion is necessary to require a reasonable suspicion test, it is important that you provide adequate

training to determine when to require the test.

In the end, the supervisor's decision should pass the "reasonable prudent individual" rule of thumb. That rule of thumb simply requires that a similarly trained and experienced supervisor, being reasonable and prudent and having observed and noted the same facts, signs, and circumstances would have come to the same conclusion. Hunches and "gut feelings" are not valid in making a reasonable suspicion determination. A reasonable suspicion referral must be based on a trained supervisor's specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the covered employee.

It is likely that most reasonable suspicion referrals will occur when employees report for duty because this is the time when supervisors have the most contact with their employees. Reasonable suspicion referrals will also be triggered by incidents and complaints by other employees or passengers during the work day. In any event, the supervisor's decisions must be made quickly and correctly.

The supervisor should

1. Remember that the primary issue is safety—remove the employee from the safety-sensitive function.
2. Inquire and observe.
3. Isolate and inform the employee.
4. Review findings.

5. Make the reasonable suspicion decision.
6. Transport the employee (not required).
7. Document events.

Remember that the Primary Issue is Safety. Employees believed to be under the influence of a prohibited substance are an immediate hazard to themselves and others. Whether management obtains the proof of reasonable suspicion of substance abuse is secondary to assuring safety.

Inquire and Observe. Ask the employee to explain the suspected behavior and to describe the events that took place from his or her perspective. A persuasive explanation should not deter or prevent you from requiring a test if you have a reasonable belief that prohibited drug use or alcohol misuse is a factor.

Denial should be an expected reaction. If persons know they will test positive, they may give many explanations and protests, wanting to avoid testing. As a result, a reasonable suspicion decision must be based on objective observations. Remember, a request for a urine specimen or a breath test is not an accusation; it is merely a request for additional objective data.

To the employee, it may feel like an accusation; so it is important to stress that this is merely a request for additional data. Explain also that the incident and the test results will be handled with strict confidentiality. Some times, just telling the employee, "I'm glad to hear your

explanation, and, in light of the circumstances, I want to verify what you have just told me," may calm the situation.

Isolate and Inform the Employee.

Remove the employee from the vehicle or workplace. Explain that you believe the employee may not be fit for duty and you are requesting him or her to accompany you to the collection site. Inform the employee of the consequences of refusal and that he or she is being relieved from duty.

It is important to respect the dignity and confidentiality of the employee during the interview.

Review Findings. During the conversation, observe physical and mental symptoms. Be sure to document any characteristics that either support or contradict the initial information. The FTA regulations only require that the reasonable suspicion referral be made by one supervisor. However, if possible, a second supervisor should be consulted. The confirmation by a second supervisor creates greater objectivity, provides additional observation, and generally strengthens the reliability of the reasonable suspicion determination.

Make the Reasonable Suspicion Decision. Anonymous tips must be taken seriously, but should not be the sole reason to initiate a request for a reasonable suspicion test. Hearsay is not an acceptable basis for a reasonable suspicion referral. If witnesses saw a specific event or behavior, the supervisor should ask them to describe what they saw. How far away were they?

How long did they observe the person? What, if anything, caused them to believe it was substance-abuse-related behavior? On what basis did they reach their conclusions?

The supervisor should observe the employee. What can the supervisor observe and objectively document as it relates to physical signs and symptoms, emotional state, physical evidence, and related facts?

Transport the Employee. Although the FTA regulations do not specify the employee must be transported, it is unwise to allow an employee suspected of being under the influence of alcohol or drugs to proceed alone to the collection site or to drive home. He or she could be a danger to self or others. In addition, the employer's exposure to liability if damage or injury occurs is great. Accompanying the employee also assures that there is no opportunity enroute to the collection site for the employee to ingest or acquire anything that could affect the test result.

The direct supervisor of the employee must not serve as the collection site person for a urine test (§653.43(3)). The supervisor who makes the determination that a reasonable suspicion exists must not conduct the breath alcohol test on that employee (§654.37(b)).

Document Events. Record the behavioral signs and symptoms that support the determination to conduct a reasonable suspicion test. The signs and symptoms to look for are more fully described in Appendix F.

FTA sponsored the production of a training aid—including a video—for transit supervisors that describes the signs and symptoms of prohibited drug use. This training program, entitled “Identification of Drug Abuse in the Workplace,” demonstrates how first-line supervisors should make fair and reliable reasonable suspicion testing referrals of subordinate employees.

Best Practices

Reasonable Suspicion Supervisory Training

A State Department of Transportation sponsored the development of a two-day reasonable suspicion training course for supervisors of small urban and rural transit systems in the State. The training included instruction by experts in the field, role playing, case studies, videos, and a display of illegal drugs and paraphernalia. Two days were considered the minimum necessary to present information regarding the signs and symptoms of drug abuse and alcohol misuse and to allow supervisors sufficient time to understand their roles and responsibilities regarding reasonable suspicion referrals.

Section 3. OTHER TRAINING

Many transit systems will wish to expand their training efforts. All provisions of the FTA regulations affect only your safety-sensitive employees. You are not required to test or to train any employees who are not safety-sensitive.

The FTA, however, applies a fairly narrow definition to safety-sensitive functions, and the definition may not include many job functions that you consider safety-sensitive. In addition, drug abuse or alcohol misuse may affect your transit operations through reduced productivity, high

health costs, and poor public relations, even where safety is not an issue.

For this reason, you may wish to train your entire work force on the importance of maintaining a drug- and alcohol-free workplace and on the resources that you have available to help employees who have problems with alcohol misuse or prohibited drugs. You must, of course, make clear which parts of your policy and program do not apply to employees who are not performing safety-sensitive functions (§653.25(i), 654.71(c)).

If you have an EAP, you should train the work force and supervisors in its availability and use. An EAP is effective only to the extent that workers and supervisors know that it is available, know what services it provides, understand its confidential nature, and know how to access it. This is the role of EAP training.

If you have an EAP, it should be discussed in the employee and supervisor drug and alcohol program training. Specifically, you should explain how the EAP interfaces (or does not interface) with the testing programs. For example, if those in violation of the regulations will be referred to the EAP for assessment and treatment, say so. If, on the other hand, employees with problems may only approach the EAP prior to testing, and those in violation will be dismissed without rehabilitation by the EAP, say that.

Above all, however, the employees must understand that the EAP is separate from the testing program, and that if they

approach the EAP on their own, the EAP is professionally and legally bound to treat them confidentially. For this reason, as well as because of the amount of detail to be conveyed, EAP training should be conducted separately from the drug and alcohol program training. You should also have separate EAP training sessions for employees and for supervisors since supervisors require special training on how to make referrals to the EAP and how to work with the EAP director and staff to resolve a wide variety of problems in the workplace. Regardless of the presence of an EAP, however, a supervisor must comply with the company policy and FTA regulations.

If you have an externally provided EAP, your contract should require the vendor to train your employees and your supervisors in its services, access, and use. You should plan the training with the vendor, however, to ensure that the vendor fully understands your drug and alcohol program policies and that the training does not include any erroneous information regarding EAP protection from provisions of your policy.

You must maintain detailed records of both your employee drug and your supervisory drug and alcohol training for two years (§653.71, 654.51). For training provided under your substance abuse management program, you must keep copies of all your training materials, including your policy.

You should keep your drug and alcohol training records wherever your system normally keeps training records.

You should retrain employees and supervisors on a regular basis. The regulations simply require an initial training session. However, many transit systems provide regular refresher training which is especially critical since employees and supervisors are unlikely to encounter substance abuse situations on a regular basis on their jobs.

Because the testing programs are critical to your system's safety, you should consider at least biennial refresher training. Without refresher training, they may forget how to respond when a situation does arise. Refresher training need not be at the same level of detail as the original training.

In addition, if your system has monthly or bimonthly safety meetings, you should include discussions of substance abuse in those meetings in order to keep the issue in your employees' and supervisors' minds.

You should maintain records of refresher training as you would any other training records.

You must ensure that medical professionals and technical personnel involved with your testing program are appropriately educated and trained. Medical professionals and technical personnel involved in your program must possess certain credentials and/or receive certain training. In many cases, this training will have been provided by professional schools or by

equipment manufacturers. It is your responsibility, however, to assure that the training has occurred.

For some employees, such as personnel at a DHHS-certified laboratory, you need not be concerned about training. However, for services for which you contract individually or for which you use your own employees (e.g., collection site personnel), professional and technical training will be an important component of your program. Figure 5-3 presents professional and technical training requirements.

Training is available from many sources. Some transit systems conduct substance abuse training themselves, while others contract with external trainers for the service. The approach you choose will depend upon the training resources available within your company, both in terms of staff time and expertise. Some of the external sources you may consider in selecting someone to develop or deliver your alcohol misuse and prohibited drug training are listed in Figure 5-4. You may choose to use company staff for some training and outside experts for other training.

Whomever you select to provide your training, you should ensure that the training will adhere to your outline and be provided in a manner supportive of your policy and programs. Although a trainer may have an off-the-shelf curriculum, that curriculum will be of little use if it does not meet the requirements of the regulations or of your system. At a minimum, the curriculum will need to be tailored to reflect the provisions

of your policy and procedures, your discipline policy, and your EAP, if any. For this reason, you may want to have someone from your human resources, medical, or labor relations department work in conjunction with the outside expert in developing and presenting the training sessions.

Important criteria to consider in selecting a trainer are:

- Workplace experience with transit or similar industries
- Concern with safety, cost reduction, productivity, liability, and public image, as well as employee welfare
- Understanding of the applicable FTA and DOT regulations and how to handle employee attitudes and concerns regarding drug and alcohol testing
- Training style; platform skills; techniques, tools, and methods appropriate to adult learning, including appropriate and high-quality audio-visual material, handouts, role playing, and case studies
- Willingness to learn about your transit system, its operations, policy, programs, values, and culture
- Flexibility, professionalism, and tact in handling diverse opinions and needs of resistant employees, assertive managers, supervisors, executives, and union representatives

Figure 5-3. Education and Training Requirements for Medical Professionals and Technicians

Who Must Be Trained	Training or Background Required
Urine Collection Personnel	<ol style="list-style-type: none"> 1. Nonmedically licensed personnel must be trained in collection procedures of part 40. 2. Licensed medical personnel need only be provided with a copy of collection instructions.
Medical Review Officer (MRO) (§40.31)	A licensed physician (medical doctor or doctor of osteopathy) responsible for receiving laboratory results generated by an employer's drug testing program who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's confirmed positive test result together with his or her medical history and any other relevant biomedical information.
Breath Alcohol Technician (BAT) (§40.51)	<p>Trained to proficiency in operation of evidential breath testing (EBT) device he or she is using (principles of EBT methodology, operation, calibration checks; fundamentals of breath analysis for alcohol content; part 40 procedures for obtaining a breath specimen and interpreting and recording EBT results).</p> <p>Only courses of instruction for operation of EBTs that are equivalent to the Department of Transportation model course, as determined by the National Highway Traffic Safety Administration (NHTSA), may be used to train BATs to proficiency. On request, NHTSA will review a BAT instruction course for equivalency.</p> <p>If the BAT will be performing external calibration checks, must be trained to proficiency in conducting the check on that specific model of EBT.</p> <p>Follow-up training must be provided for new or additional devices or changes in technology.</p>
Substance Abuse Professional (SAP) (§653.7, 654.7)	A licensed physician (medical doctor or doctor of osteopathy), or a licensed or certified psychologist, social worker, employee assistance professional, or addiction counselor (certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission), with knowledge of and clinical experience in the diagnosis and treatment of drug- and alcohol-related disorders.

Figure 5-4. Potential Sources of Trainers

1. Your EAP provider
2. Mental health professionals
3. Drug and alcohol treatment specialists
4. Pharmacists
5. Toxicologists
6. Nurses and physicians
7. Consultants specializing in the field of substance abuse in the workplace
8. Local law enforcement drug awareness specialists
9. Your State alcohol and drug clearinghouse which may maintain a speaker's bureau or list of consultants
10. Nonprofit organizations in your State such as Connecticut's "Drugs Don't Work!" or Texas' "War on Drugs"
11. National organizations and their local affiliates such as the National Council on Alcoholism and Drug Dependence and the Employee Assistance Professionals Association and their State chapters
12. Larger transit systems near you that have provided or are providing training to their employees and supervisors

Sample Documentation

Summary of Education and Training Requirements

Program	Who Must Be Educated or Trained	What Must They Receive	Content
Alcohol	All Safety-Sensitive Employees and Employee Organizations	Written Notice of Availability of This Information	<ol style="list-style-type: none"> 1. Contact person 2. Safety-sensitive employee categories 3. When employees are required to be in compliance 4. Prohibited behavior 5. Circumstances when employee is tested 6. Testing procedures 7. Mandatory testing requirement for safety-sensitive functions 8. Consequences of refusing to submit to a test 9. Consequences of a verified positive drug test 10. Consequences of an alcohol concentration greater than 0.04 11. Consequences of an alcohol concentration of 0.02 or greater and less than 0.04 12. Information about effects of alcohol misuse on individual's health, work, and personal life; signs and symptoms of alcohol problem.
	All Safety-Sensitive Employees	Copies of This Information	<ol style="list-style-type: none"> 1. Alcohol regulation requirements 2. Employer policy & procedures
	Supervisors Designated to Make Reasonable Suspicion Determinations	At Least 60 Minutes of Training	Indicators of probable alcohol misuse: <ol style="list-style-type: none"> 1. Physical 2. Behavioral 3. Speech 4. Performance 5. Odors
Drugs	All Safety-Sensitive Employees and Employee Organizations	Written Notice of Availability and Display of This Information	<ol style="list-style-type: none"> 1. Drug regulation requirements 2. Employer policy & procedures 3. Informational material 4. Hotline telephone number
	All Safety-Sensitive Employees	Copies of This Information	<ol style="list-style-type: none"> 1. Drug regulation requirements 2. Employer policy & procedures
	All Safety-Sensitive Employees	60 Minutes of Training	<ol style="list-style-type: none"> 1. Effects of drug use on: personal health; safety; and work environment 2. Manifestations and behavioral cues indicating drug use
	Supervisors Designated to Make Reasonable Suspicion Determinations	An Additional 60 Minutes of Training	Indicators of probable drug use: <ol style="list-style-type: none"> 1. Physical 2. Behavioral 3. Performance 4. Speech 5. Odors

Sample Training Agenda That Complies with the FTA Drug Regulation for Your Safety-Sensitive Employees

- I. Impact of Drug Abuse on Society and Industry
 - A. National and Regional Statistics on Prohibited Drug Use
 - B. How Drug Use Affects Industry
 - 1. Safety
 - 2. Personal Health
 - 3. Work Environment
- II. How Have the Federal Government and the Transit Industry Responded?
 - A. Drug-Free Workplace Act
 - B. Prevention of Prohibited Drug Use in Transit Operations (49 CFR part 653)
 - C. (Transit System) Policy on Prohibited Drugs
- III. Safety, Personal Health, and Work Environment Effects of the Following Drugs and Drug Classes
 - A. Marijuana
 - B. Cocaine
 - C. Opiates
 - D. Amphetamines
 - E. Phencyclidine
- IV. Manifestations and Behavioral Cues That May Indicate Prohibited Drug Use
 - A. Marijuana
 - B. Cocaine
 - C. Opiates
 - D. Amphetamines
 - E. Phencyclidine
- V. Procedures and Protections of the (Transit System) Prohibited Drug Program
- VI. Questions and Answers

Typical Agenda for Supervisory Training for Compliance with Both Drug and Alcohol Regulations

- I. Impact of Prohibited Drug Use and Alcohol Misuse on Society and Industry
 - A. National and Regional Statistics on Drug and Alcohol Abuse
 - B. How Drug and Alcohol Use Affects Industry in General, and Transit in Particular
- II. How Have the Federal Government and the Transit Industry Responded?
 - A. Drug-Free Workplace Act
 - B. Prevention of Prohibited Drug Use in Transit Operations (49 CFR part 653) and Prevention of Alcohol Misuse in Transit Operations (49 CFR part 654)
 - C. (Transit System) Policy on Drugs and Alcohol
- III. Safety, Personal Health, & Work Environment Effects of Alcohol Misuse & Prohibited Drug Use
- IV. Procedures and Protections of the (Transit System) Drug and Alcohol Programs
- V. Responsibility of Supervisors Especially as Related to Drug and Alcohol Programs
 - A. To Supervise
 - B. To Deal with Problems in the Workplace
 - C. Unacceptable, Deteriorating, and Unsafe Performance Are Examples of Such Problems
 - D. Prohibited Drug Use or Alcohol Misuse May Be the Cause of Unacceptable, Deteriorating, or Unsafe Performance
- VI. Indicators of Probable Alcohol Misuse or Prohibited Drug Misuse (Present as types common to all substance abuse and individually by alcohol, marijuana, cocaine, opiates, amphetamines, and phencyclidine)
 - A. Physical
 - B. Behavioral
 - C. Speech
 - D. Performance
 - E. Body Odors
- VII. Supervisory Responsibilities
 - A. Removal from Safety-Sensitive Position
 - B. Observation and Documentation
 - C. Confidentiality of the Employee
 - D. Review Findings
 - E. Make Reasonable Suspicion Decision
 - F. Escort to Collection Site (not required by FTA Regulations)
 - G. Escort Home (not required by FTA Regulations)
 - H. Special Considerations in Dealing with Alcohol- or Drug-Influenced Employees (not required by FTA Regulations)
- VIII. Conflict Resolution
- IX. Resources Available to the Supervisor
 - A. Substance Abuse Program Manager
 - B. Medical Review Officer
 - C. Substance Abuse Professional
 - D. Employee Assistance Program
 - E. Security and Law Enforcement
 - F. Other
- X. Questions and Answers



Chapter 6.

TYPES OF TESTING

Six types of testing are required by the drug and alcohol rules:

- Pre-employment
- Reasonable suspicion
- Post-accident
- Random
- Return to duty
- Follow-up.

In addition to these six types of testing, transit systems are also required to perform blind sample testing as a quality assurance measure for the testing laboratory (§40.31).

Section 1. PRE-EMPLOYMENT TESTING

The FTA regulations (§653.41, 654.31) require that all applicants for employment in safety-sensitive positions or individuals being transferred into safety-sensitive positions must be given pre-employment drug and alcohol tests. Employees may not be hired or assigned to the safety-sensitive function unless they pass the tests. Prior to conducting the tests, you must inform the applicant or employee in writing of the testing requirements (§653.27, 654.71).



The purpose of pre-employment testing is to identify applicants who have consumed a prohibited drug in the recent past or who may have problems with the misuse of alcohol. This behavior has the potential to impact the workplace and may present an unacceptable safety risk to the employee, coworkers, passengers, and the general public. Pre-employment testing identifies employees who could bring a drug or alcohol problem into your transit agency.

The FTA regulations prohibit you from assigning an individual who has violated either the drug or alcohol regulations to a safety-sensitive position. However, if at a later time, the same individual applies again for a safety-sensitive position, you must administer the drug and alcohol tests again. If there is no violation with the second tests, you may assign the individual to a safety-sensitive position. To save your time, however, you may find it helpful to require the applicant to provide evidence of well-being from a treatment specialist before administering the second tests.

An employer may elect not to administer a pre-employment alcohol test if

- The applicant has undergone an alcohol test required by 49 CFR 654 or the alcohol misuse rule of another DOT agency under part 40 within the previous 6 months, with a result indicating an alcohol concentration less than 0.04; and
- The employer ensures that no prior employer of the applicant of whom the employer has knowledge has records of a violation of the FTA

alcohol rule or the alcohol misuse rule of another DOT agency within the previous 6 months.

The FTA regulations permit, but do not require, the release of the results to the person being tested. However, prior to making a final decision to verify a positive drug test result, the Medical Review Officer (MRO) must give the applicant an opportunity to discuss the results (§40.33).

If a pre-employment drug test is cancelled, the employer shall require the employee or applicant to submit to and pass another test.

Best Practices

Pre-Employment Testing

The transit district members of a State-wide consortium make it clear to applicants for safety-sensitive positions that passing a drug test is a condition of employment. In addition to including that stipulation in all newspaper notices and other forms of vacancy announcements, applicants must sign a form acknowledging that they know they will be tested. The form they sign prominently displays the message, "YOUR APPLICATION WILL BE CONSIDERED INCOMPLETE IF THIS NOTICE IS NOT SIGNED AND DATED."

Section 2. REASONABLE SUSPICION TESTING

The FTA regulations (§653.43, 654.37) also require a safety-sensitive employee to submit to a test when the employer has reasonable suspicion that the employee has used a prohibited drug or has misused alcohol as defined in the regulations. The

request to undergo a reasonable suspicion test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odor of the safety-sensitive employee.

Reasonable suspicion testing is designed to provide management with a tool to identify affected employees who may pose a danger to themselves and others in their performance of safety-sensitive functions. Employees may be at work in a condition that raises concern regarding their safety or productivity. A supervisor must then make a decision as to whether reasonable suspicion exists to conclude that substance abuse may be causing the behavior.

A supervisor who will be called upon to make this determination, must be trained in the facts, circumstances, physical evidence, physical signs and symptoms, or patterns of performance and/or behavior that are associated with use.

Besides recognizing valid objective signs and symptoms of prohibited drug use and alcohol misuse, supervisors must also know the proper procedures for confronting and referring the employee for testing. If supervisors are not trained, or are not fair and objective in requesting reasonable suspicion tests, employee complaints of harassment are bound to result. Be careful not to expect that training alone will make your supervisors experts in detecting substance abuse. The overt signs and symptoms of substance abuse can often be masked and may be subtle enough to avoid

direct detection. Training is described in more detail in Chapter 5, "Training".

If a supervisor, trained to identify the signs and symptoms of drug and alcohol use, reasonably concludes that objective facts may indicate drug use or alcohol misuse, this is sufficient justification for testing. A final practical check is whether the supervisor would have been less responsible in not taking action than in asking the employee to submit to testing. Remember, safety is the first priority.



Flowcharts detailing the reasonable suspicion testing processes for drug and alcohol appear at the end of this chapter.

Section 3. POST-ACCIDENT TESTING

The FTA regulations (§653.45, 654.33) require testing for prohibited drugs and alcohol in the case of certain mass transit accidents.

There is a significant difference between reasonable suspicion testing and post-accident testing. Reasonable suspicion requires some indication of probable linkage between behavior or events and substance abuse before a test can be requested. Post-accident testing is mandatory for accidents where there is loss of life and for other nonfatal accidents unless employee performance can be discounted completely as a causative or contributing factor.

An accident (§653.7, 654.7) is defined as an occurrence associated with the operation of a vehicle in which

- An individual dies
- An individual suffers a bodily injury and immediately receives medical treatment away from the scene of an accident
- The mass transit vehicle involved is a bus, electric bus, van, or automobile in which one or more vehicles incurs disabling damage as the result of the occurrence and is transported away from the scene by a tow truck or other vehicle
- The mass transit vehicle involved is a railcar, trolley car, trolley bus, or vessel, and is removed from revenue service.

"Disabling damage" means damage that precludes departure of any vehicle from the scene of the occurrence in its usual manner in daylight after simple repairs. Disabling damage includes damage to vehicles that could have been

operated but would have been further damaged if so operated.

Disabling damage does not include damage that could be remedied temporarily at the scene of the occurrence without special tools or parts; tire disablement without other damage even if no spare tire is available; or damage to headlights, tail-lights, turn signals, horn, or windshield wipers that makes them inoperative.



Fatal Accident

Whenever there is a loss of human life, each surviving safety-sensitive employee on duty in the mass transit vehicle at the time of the accident must be tested. Safety-sensitive employees not on the vehicle (e.g., maintenance personnel), whose performance could have contributed to the accident (as determined by the transit agency using the best information available at the time of the accident) must be tested.

Nonfatal Accident

Following nonfatal accidents involving a bus, electric bus, van, or automobile, employers shall test each safety-sensitive employee on duty in the mass transit vehicle at the time of the accident if the employee received a citation under State or local law for a moving traffic violation arising from the accident (§653.45, 654.33).

Safety-sensitive employees in nonfatal accidents involving railcars, trolley cars, trolley buses, or vessels on duty in the vehicle at the time of the accident must be tested unless their behavior can be completely discounted as a contributing factor to the accident.

For nonfatal accidents, the employer shall test any other safety-sensitive employee whose performance could have contributed to the accident, as determined by the employer using the best information available at the time of the accident.

Post-accident drug and alcohol tests must be performed as soon as possible. Drug tests must be performed within 32 hours following the accident. Alcohol tests must be performed within 8 hours.

If an alcohol test is not administered within 2 hours following the accident, the employer must still attempt to administer the test, and must also prepare and maintain on file a record stating the reason(s) the test was not promptly administered. If an alcohol test is still not administered within 8 hours following the accident, the employer shall cease attempts to administer

an alcohol test and shall maintain the same record.

The requirement to test for drugs and alcohol following an accident should in no way delay necessary medical attention for injured people or prohibit a safety-sensitive employee from leaving the scene of an accident to obtain assistance in responding to the accident or to obtain necessary emergency medical care. However, the safety-sensitive employee must remain readily available, which means the transit agency knows the location of the safety-sensitive employee.

The steps to follow in a post-accident situation are summarized as follows:

1. **Treat any injury first.** The accident victims' physical health is always a higher priority than conducting a substance abuse test.
2. **Cooperate with law enforcement officers.** Allow local law enforcement to conduct their investigation. For purposes of their investigation, the police may require a drug or alcohol test for a legal determination of the presence of drugs or alcohol. *Remember that you cannot use the results of a test given for law enforcement purposes; you must administer post-accident tests in accordance with FTA's regulations.*
3. **Explain the need for testing.** Tell the employee that a test is to be conducted. Point out to the employee that a negative finding will objectively put to rest any suspicion of drugs and alcohol as a cause of the accident.

4. **Conduct tests promptly.** The FTA regulations require that specimen collection be performed as soon as possible, but within 32 hours following the accident for drugs and no later than eight hours for alcohol.

5. **Collect accident documentation promptly.** In the rush to clear an accident and treat injuries, it is easy to overlook important evidence regarding the accident. Eyewitness accounts, photographs, and police reports may all be of value at a later arbitration hearing or trial regarding your conduct of post-accident testing. You should collect and document as many facts and observations as possible immediately following the accident. You should note the time and date of both the accident and the test.

Flowcharts detailing the post-accident testing processes may be found at the end of this chapter.

Section 4. RANDOM TESTING

The FTA regulations (§653.47, 654.35) require random testing of drugs and alcohol for all safety-sensitive employees. Random testing identifies employees who are using drugs or misusing alcohol but are able to use the predictability of other testing methods to escape detection. More importantly, it is widely believed that random testing serves as a strong deterrent against employees beginning or continuing prohibited drug use and misuse of alcohol at your transit agency.

Transit agencies must use a scientifically valid random-number selection

method to select safety-sensitive employees. Valid methods include the use of a random-number table or a computer-based random-number generator that is matched with safety-sensitive employees' identification numbers.

At least 50 percent of the total number of safety-sensitive employees subject to drug testing and 25 percent subject to alcohol testing must be tested each year. A slightly higher percentage should be tested to provide for cancelled tests. If the transit system joins a consortium for random-number selection, the annual rate may be calculated for each individual consortium organizational member or for the total number of safety-sensitive employees within the consortium (see Chapter 11, "Joining a Consortium").



The FTA's random alcohol testing rate may be adjusted based on analysis of positive random test results within the entire transit industry (§654.35). If this occurs,

the change will be published in the *Federal Register* and noted in updates of the guidelines.

The test dates must be spread reasonably throughout the year and not establish a predictable pattern (e.g., the first Tuesday of each month) (§653.47, 654.35(g)). The number of tests conducted weekly, monthly, or quarterly should remain relatively constant to the extent possible. Conducting all of your tests in one month, for example, does not achieve the goal of random testing. Likewise, the testing should be performed on different days of the week and at different times throughout the annual cycle. This prevents employees from coordinating their drug and alcohol use to the random testing schedule.

The process must be unannounced as well as random. Once the employee has been notified that he/she has been selected for testing, he/she should then report immediately to the collection site.

All safety-sensitive employees in the random pool must have an equal chance of being selected for testing and shall remain in the pool, even after being tested. It is possible for some employees to be tested several times in one year, and other employees not to be tested for several years. It is imperative to remember that all safety-sensitive employees must be included in the random pool. If the transit agency decides to randomly test nonsafety-sensitive employees, those employees must be placed in a separate pool and tested under the transit agency's authority, not the DOT's and FTA's.

Once the list of employee identification numbers has been developed, use it for random selection without any correlation to actual employee names. One way to do this is to contract out the random-number selection process. The contractor organization would only have the numbers and would not be able to correlate the numbers with any employee name.

When developing a random testing program, you should establish a standard procedure and practice for notifying employees who have been selected. In addition, you should schedule additional personnel to fill in for absent employees on the day of testing. Exercise care in such scheduling so that it does not provide advance notice of when testing will occur.

Every effort should be made to provide the maximum privacy possible. Employees should be individually and discretely notified to report to the collection site. Assure employees selected for testing that this is a routine random test. They should not feel that they have been singled out for testing for reasonable suspicion or for some other unstated reason. Flowcharts detailing the random testing processes may be found at the end of this chapter.

The FTA *Random Drug Testing Manual*, published in September 1991, describes the random selection process in detail. Consult this publication when choosing an approach to random testing, deciding when to test, and developing the selection and notification procedures.

Best Practices

Random Testing

One of the most sensitive types of testing is random testing. Two particular problems are: the concern by employees and their representatives that the selection is not truly random and that individual employees are being singled out for testing and harassment and the ability to select a random sample when there are few safety-sensitive employees in the random pool. Indeed, if your system is challenged on a random test, you may be required to demonstrate that you are properly applying a valid random selection methodology.

Some transit systems contract out random selection. For example, one State consortium employs a management company to administer its entire program. Part of this responsibility involves maintaining the random test pool by using payroll information from each member system to update the pool membership. Because employees of all systems are pooled together, the pool is large enough that the likelihood of any one employee being repeatedly selected is lessened. Likewise, since no manager at any of the transit systems is involved in the selection process (all selection is done in a controlled access area of the consortium management company), no employee need fear that he or she has been unfairly singled out for testing.

Section 5. RETURN TO DUTY TESTING

Before any employee is allowed to return to duty to perform a safety-sensitive function following a verified positive drug test result, an alcohol result 0.04 or greater, a refusal to submit to a test, or any other activity that violates the regulations, that employee must first be evaluated by a

substance abuse professional and pass a return to duty test (§653.49, 654.39).

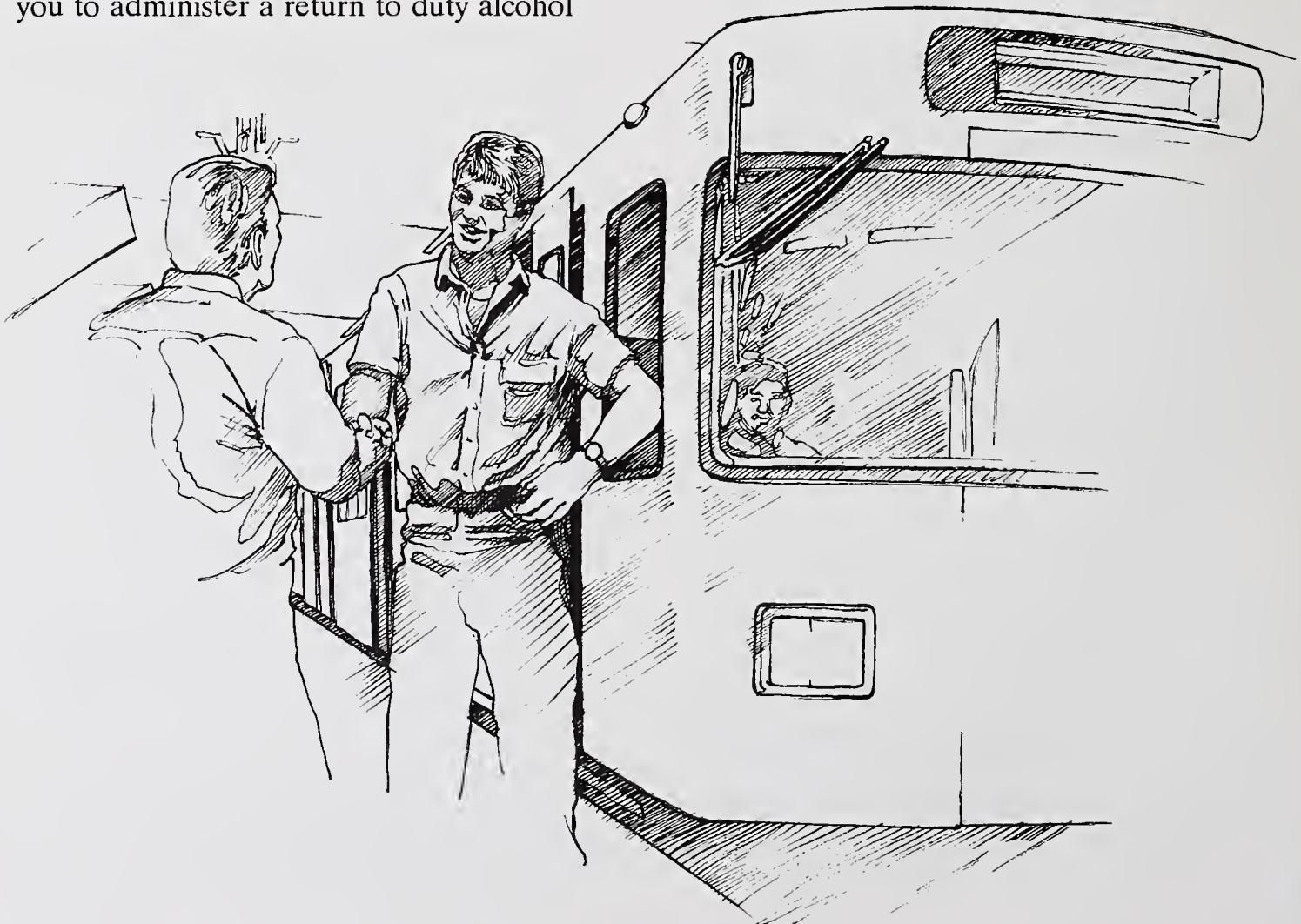
The purpose of the return to duty test and the evaluation of an individual's return to duty status by the substance abuse professional is to provide some degree of assurance to the employer that the individual is presently free of alcohol and/or any prohibited drugs and is able to return to work without undue concern about continued substance abuse.

Since many alcohol or drug users are "polyusers," that is, they may use both alcohol and drugs, the FTA regulations allow you to administer a return to duty drug test even though the original infraction was due to alcohol. The FTA regulations also allow you to administer a return to duty alcohol

test, even though the original infraction was drug-related (§653.49(a)(3), 654.75(c)(1)).

Before a return to duty test is performed, the employee must be evaluated by a substance abuse professional to determine whether the employee has followed the recommendations for action by the SAP, including participation in any rehabilitation program.

The employee must have a verified negative drug test result or an alcohol test result of less than 0.02 to return to a safety-sensitive function. If a drug test result is cancelled, the employer shall require the employee to submit to and pass another drug test.



Marine employees subject to U.S. Coast Guard chemical testing regulations shall ensure that each safety-sensitive employee with a verified positive drug test result is also evaluated by an MRO as part of the return to duty process.

Flowcharts detailing the return to duty testing processes may be found at the end of this chapter.

Section 6. FOLLOW-UP TESTING

Required Testing

Once allowed to return to duty, an employee shall be subject to unannounced follow-up testing for at least 12 but not more than 60 months. The frequency and duration of the follow-up testing will be recommended by the substance abuse professional as long as a minimum of six tests are performed during the first 12 months after the employee has returned to duty (§653.51, 654.41).

Follow-up testing is separate from and in addition to the regular random testing program. Employees subject to follow-up testing must also remain in the standard random pool and must be tested whenever their names come up for random testing, even if this means being tested twice in the same day, week, or month.

Follow-up testing both motivates the employee to remain free of any prohibited substances and provides you with assurance that the person has not resumed drug use

or alcohol misuse. You should remember that, depending on the individual, the substance of abuse, and the effectiveness of treatment, the relapse rate may be high.

Optional Testing

You may wish to do follow-up testing of your employees beyond the 12-month requirement (§653.63, 654.75). Follow-up testing can be done for up to a total of five (5) years or 60 months. Follow-up testing must not exceed 60 months from the time the employee returns to duty, but can be terminated anytime after the first 12 months, if the SAP determines testing is no longer required.

To be effective, follow-up testing should be conducted frequently. Depending upon what the transit operator desires and any evaluation and recommendation by a substance abuse professional, testing may be conducted with varying frequency (weekly, biweekly, or monthly) at the outset and may decline to monthly or quarterly testing as the first complete year of recovery is approached, as long as the minimum of six (6) tests are performed within the first 12 months.

If the employee is subject to drug follow-up tests, the employer may also require the employee to take one or more follow-up alcohol tests with a result of less than 0.04 (§653.51). If the employee is subject to alcohol follow-up tests, the employer may require the employee to take one or more follow-up drug tests with a verified negative result (§654.75(c)(2)(ii)).

Follow-up testing may be viewed as part of an employee treatment plan, as opposed to a purely preventive measure or a disciplinary check. One way to reinforce this concept, while protecting your interests as an employer, is to negotiate a return to duty contract with the employee. Such a contract spells out desired employee performance goals and obligations (e.g., remaining free of prohibited substances) and clearly states the consequences if the employee fails to adhere to the provisions of the contract.

Flowcharts detailing the follow-up testing processes may be found at the end of this chapter.

Section 7. BLIND PERFORMANCE TESTING

In addition to the six major employee testing categories described above, transit agencies are required to perform blind sample proficiency testing as a quality assurance measure for the testing laboratory (§40.31).

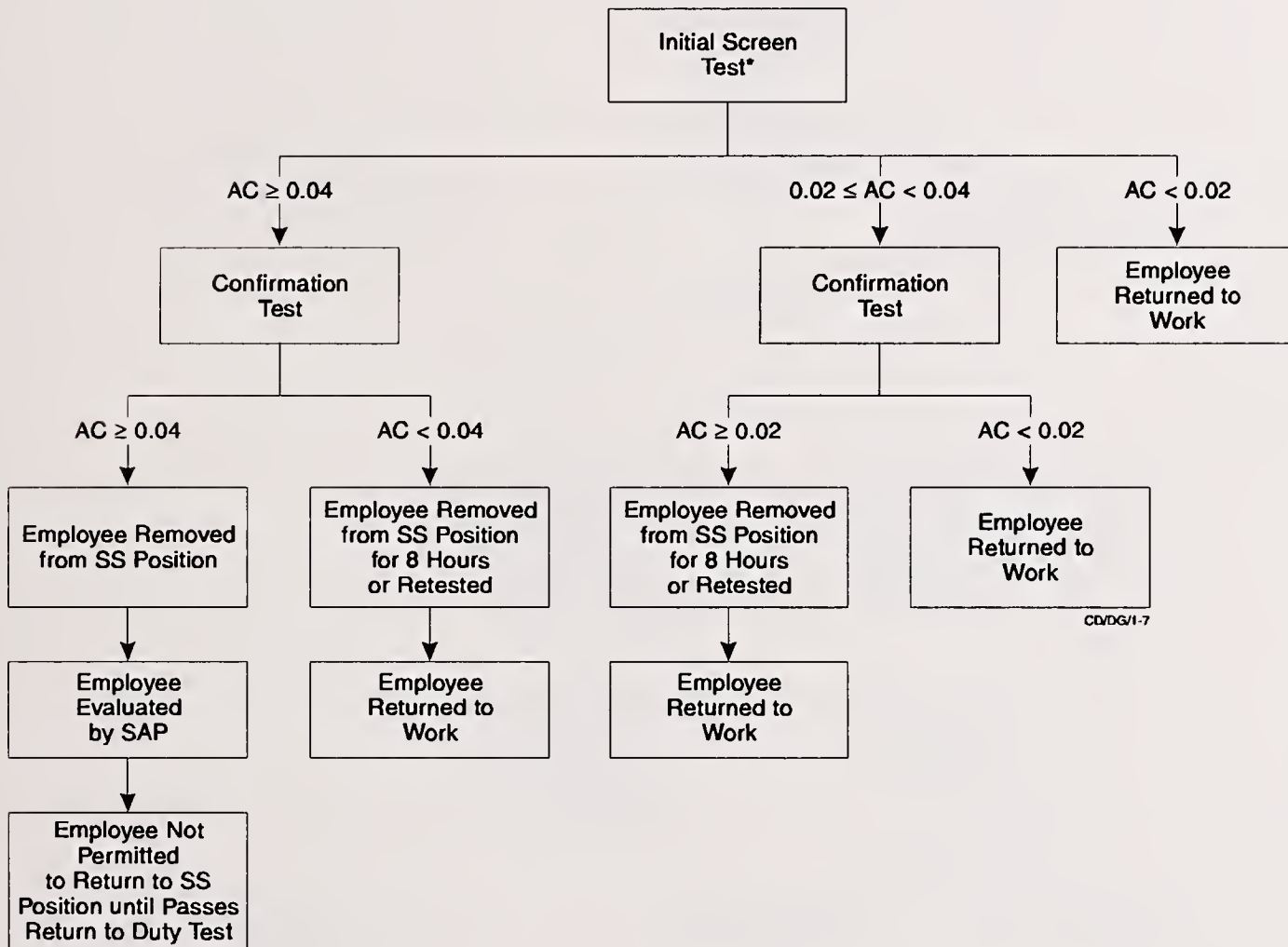
Employers are required to submit three quality control specimens to the laboratory

for every 100 employee specimens sent for testing, up to a maximum of 100 blind samples per quarter. These specimens are called blind performance tests because the testing laboratory does not know they are quality control specimens rather than actual employee specimens.

The blind quality control specimens must not be distinguishable from employee specimens. Blind quality control specimens can either be blanks (negatives) or spikes (positives). If a laboratory reports a positive on a quality control specimen that was a blank (negative), the employer should notify the FTA immediately. If a laboratory reports a negative on a quality control specimen that was a spike (positive), the employer should notify the laboratory and attempt to discover the cause of the error. Repeated false negative errors should be reported to the FTA.

The DOT and FTA regulations do not address where transit agencies must obtain blind performance specimens. However, you are encouraged to obtain blind specimens from specimen vendors. A list of vendors can be obtained from DHHS (see Appendix B).

Alcohol Testing Process for Random, Reasonable Suspicion, Post-Accident

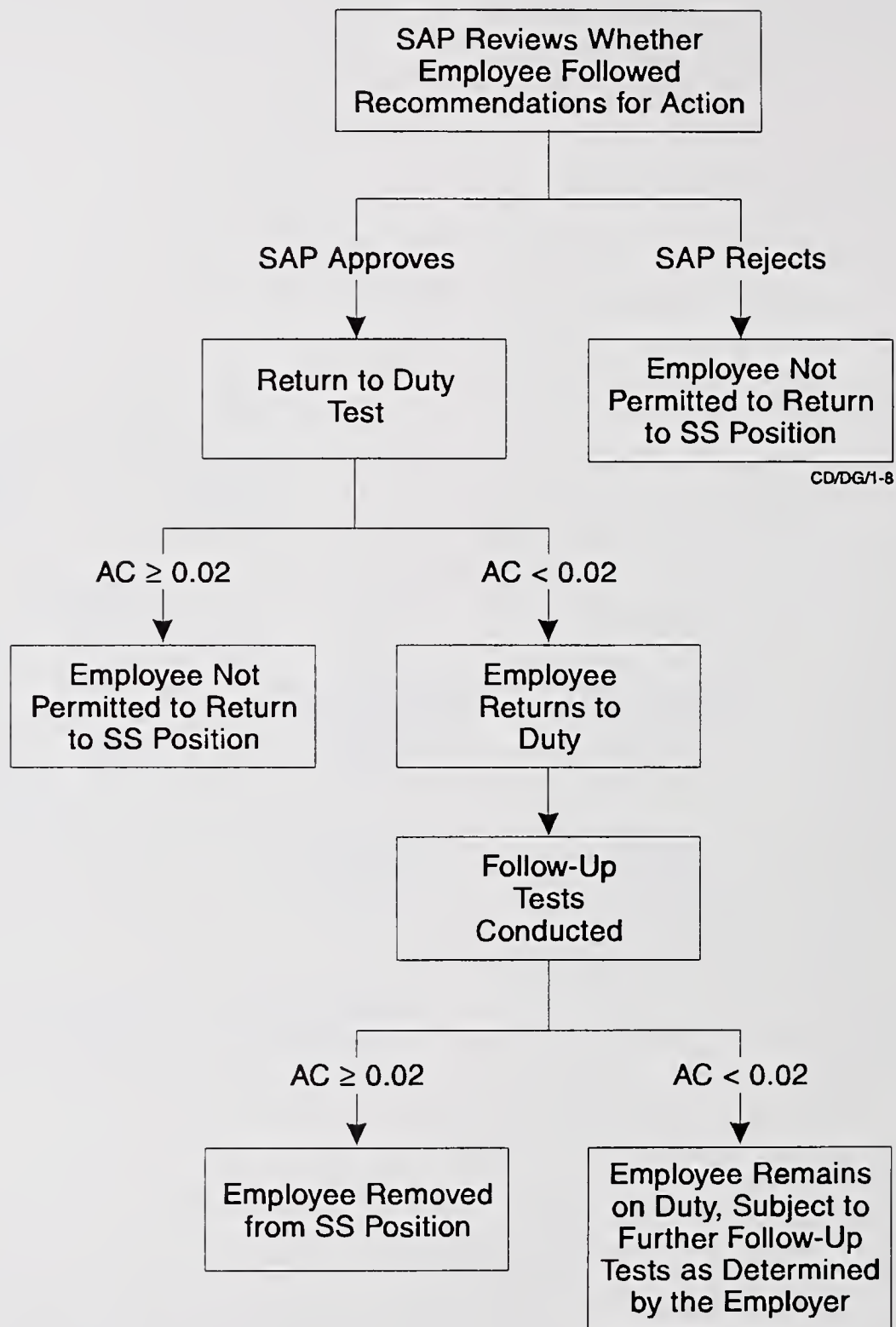


CD/DG/1-7

Notes: AC = Alcohol Concentration
 SS = Safety-Sensitive
 SAP = Substance Abuse Professional

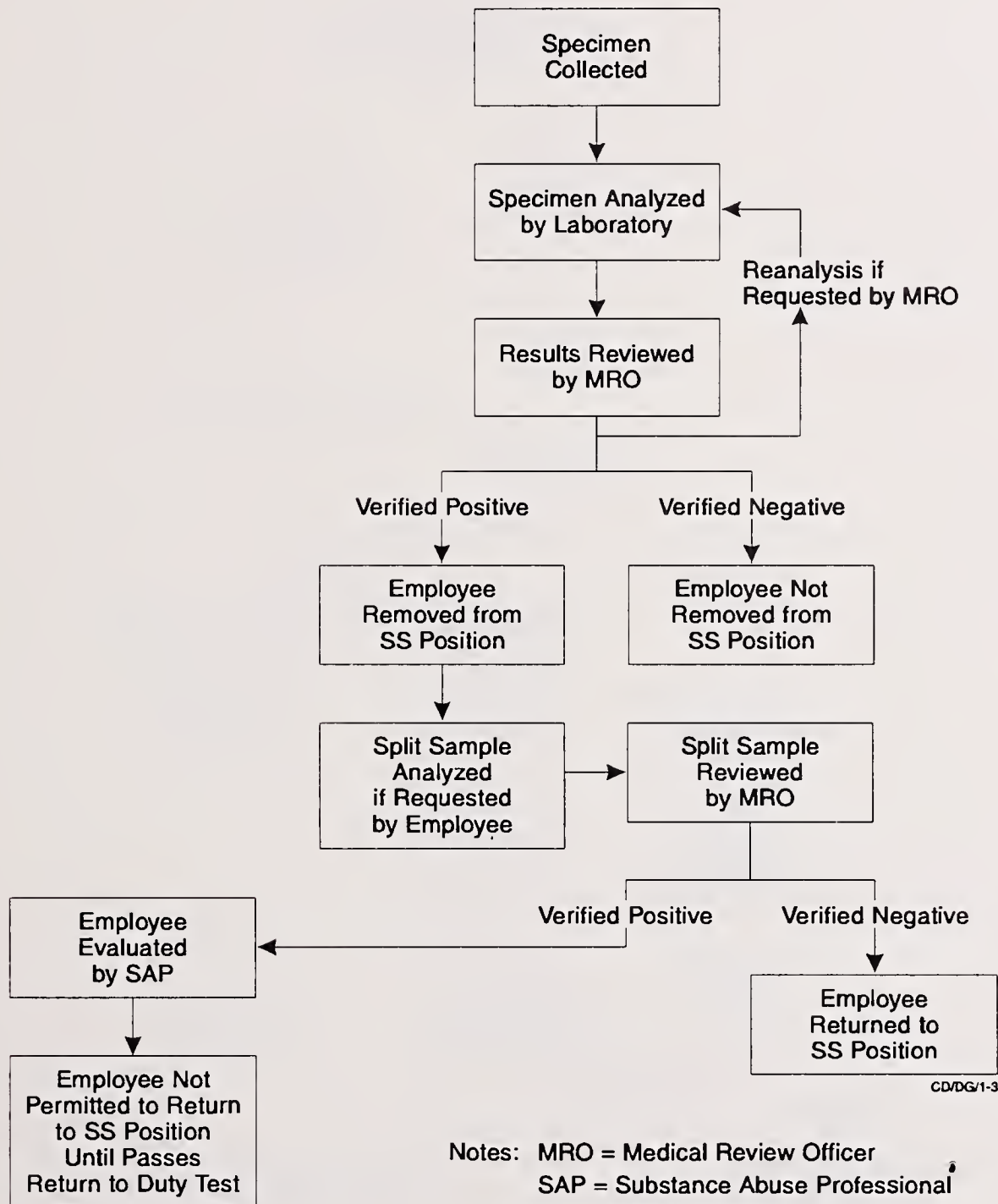
* The term "Initial Screen Test" will be fully explained in Chapter 8.

Alcohol Testing Process for Return to Duty, Follow-Up

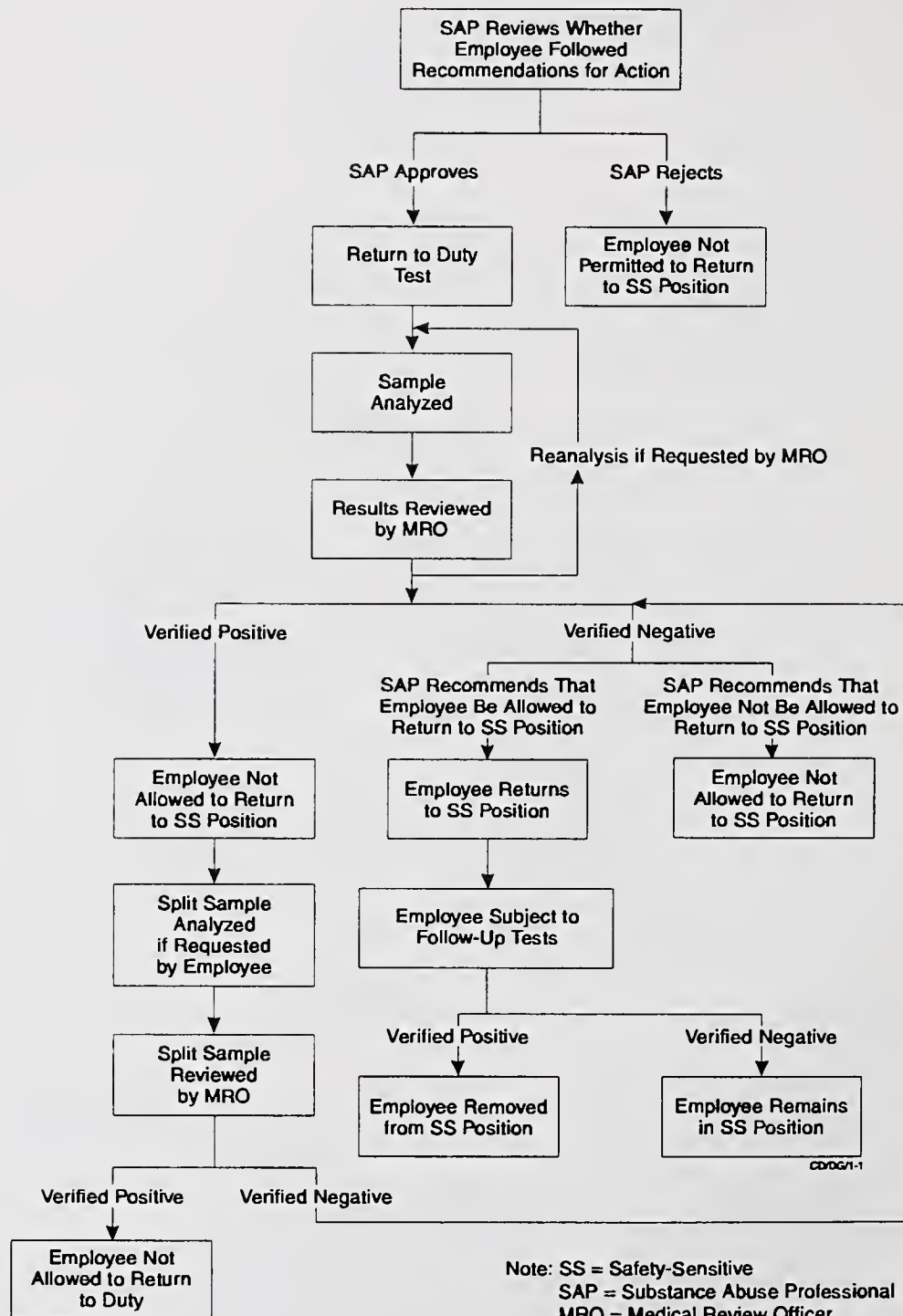


Notes: AC = Alcohol Concentration
SS = Safety-Sensitive
SAP = Substance Abuse Professional

Drug Testing Process for Random, Reasonable Suspicion, Post-Accident



Drug Testing Process for Return to Duty, Follow-Up





Chapter 7.

DRUG TESTING PROCEDURES

Under the FTA drug testing regulation for safety-sensitive employees, you are required to conduct laboratory testing of urine specimens for five types of drugs (§653.31). Identification of either a drug or its metabolite in the urine indicates use of the drug in the recent past. A metabolite is a modified form of a drug that has been chemically altered by the body's metabolic system. Depending upon the drug and the person's usage habits, the detection period ranges from less than one day to about a month.

The FTA regulation requires testing for the following drugs (or their metabolites):

- Marijuana
- Cocaine
- Opiates (e.g., heroin, morphine, codeine)
- Phencyclidine (PCP)
- Amphetamines (e.g., racemic amphetamine, dextroamphetamine, and methamphetamine).

If you chose to test for other drugs such as barbiturates, benzodiazepines (e.g., Valium, Librium, Xanax), nonbarbiturate sedatives (e.g., Quaalude), and nonamphetamine stimulants, you may do so as long as the tests for those additional drugs are

performed separately from the FTA test. Such testing is outside the scope of the FTA regulation and is entirely at the discretion of the transit system. Performing tests separately means that you must obtain a separate urine specimen from the employee and process that specimen with its own custody and control form. Employees must be notified whether they are being tested under the FTA required program or your program.

Section 1. OBTAINING PROGRAM SERVICES

In establishing an effective drug testing program, you will need to utilize certain specialized services. These include

- Specimen collection
- Laboratory testing
- Medical Review Officer (MRO)
- Substance Abuse Professional (SAP).

If you do not have qualified individuals on staff, you will need to identify qualified contractors to provide each of these services. Each of the above services is discussed individually in this section. A cost model in Chapter 12, "Business Analysis," is provided to assist you in determining the estimated costs for program services based on the number of safety-sensitive employees.

Specimen Collection

All urine specimens must be collected at an appropriate collection site. A collec-

tion site is defined (§40.3) as "a place designated by the employer where individuals present themselves for the purpose of providing a specimen of their urine to be analyzed for the presence of drugs." You are required to designate such a site or sites, depending on your needs. Typically, collection sites are at physician's offices, commercial collection site, or a local hospital or clinic. Some transit systems may wish to establish collection sites on the transit system premises. On-premise collection sites may also be used during times when commercial or third-party sites are unavailable (e.g., nights, weekends, holidays).

Regardless of where the collection site is located, it must meet the Department of Transportation guidelines established in "Procedures for Transportation Workplace Drug and Alcohol Testing Programs" (49 CFR part 40). That regulation (§40.25) requires, in part, that the site provide a privacy enclosure for urination, a toilet, a suitable clean writing surface, and a water source for hand washing, which, if practicable, should be outside the privacy enclosure. The collection site must be secured when not in use or, if this is not possible (e.g., when a public restroom is used), the site must be visually inspected prior to specimen collection to ensure that unauthorized persons are not present and that there are no unobserved entrance points. Access to the site must be restricted during specimen collection. To assist the specimen collector in determining if the employee has attempted to dilute his/her specimen, a bluing agent must be added to the toilet water, and other sources of water (such as a sink or shower) should be turned

cations should be included in the contract.

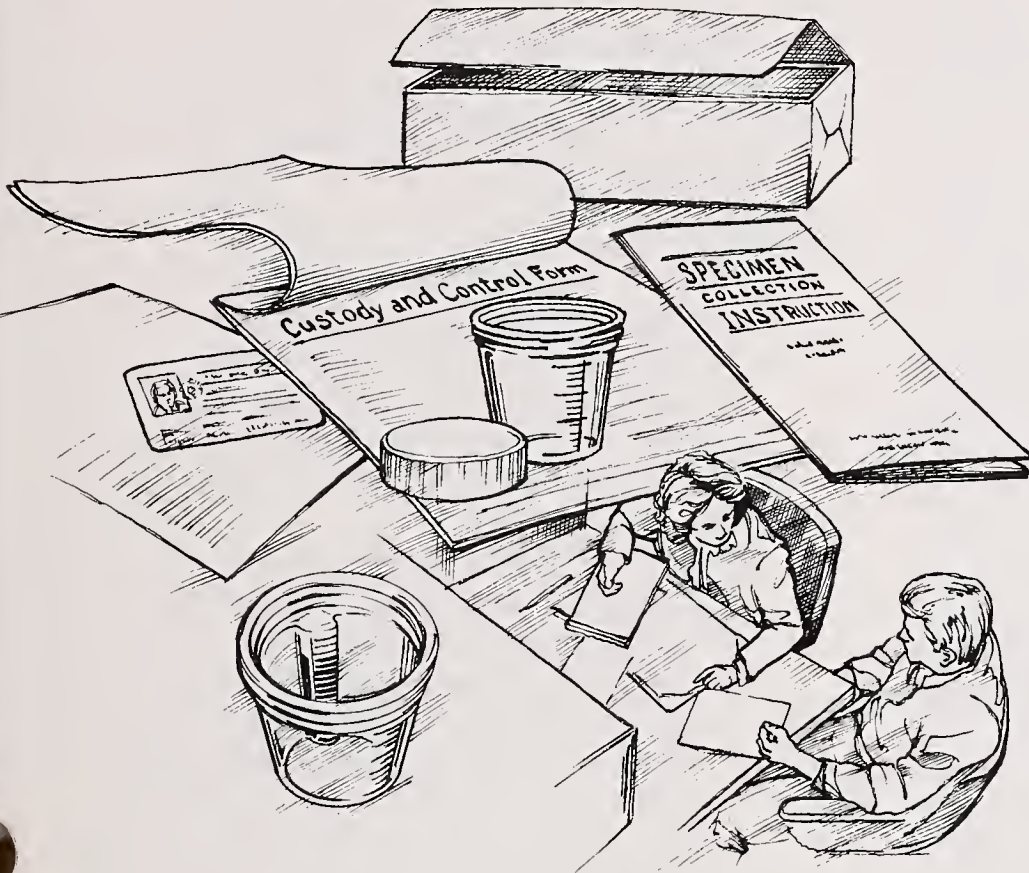
Collection Site Personnel.

The collection site personnel are responsible for the integrity of the specimen collection and transfer process, and for ensuring the dignity and privacy of the donor. They should avoid any remarks that may be construed as accusatory or otherwise offensive or inappropriate. You should ensure that all collection site staff are trained to prepare the collection site, collect specimens, examine specimens for tampering or sample adulteration, observe collections, split the specimens, and properly label and preserve chain of custody of specimens.

off or taped in such a way to prevent use if they are located within the privacy enclosure where urination occurs. At a minimum, other sources of water must be monitored to ensure that they are not used to adulterate the sample.

If you use an off-premise collection site staffed by medical/technical personnel it must meet DOT requirements. You should provide a complete copy of 49 CFR part 40 to the selected contract facility representative and require compliance with all applicable DOT requirements as part of the contract. The site personnel should acknowledge receipt of the regulations and maintain a copy in their files. In addition, the minimum collection site facility specifi-

You may choose to contract for collection site services or you may establish your own site with trained employees. Contracting for this service eliminates the need to establish a secure collection site and to train staff in collection procedures. Further, it removes your staff from direct involvement in the collection and testing process and turns these functions over to impartial outside technical persons who have no direct relationship with your employees. Contracting for collection services, however, does not relieve you from responsibility for ensuring that the complete collection process meets all applicable regulatory requirements established by FTA and DOT (§40.25).



Best Practices

Mobile Collection Units

In addition to transporting individuals to a collection site for testing, one transit system also has a contract for mobile facility collections for after-hours and immediate response collections (i.e., post-accident). The mobile unit is a fully-equipped van including a void receptacle and a breathalyzer. The unit is staffed by trained nurses and is dispatched upon receiving a request from the transit system. The mobile unit also serves as a back-up for the primary collection site.

You may operate your own collection site if staff receive training on preparing the collection site, collecting samples, examining samples for tampering or adulteration, observing collections, and properly labeling and preserving chain of custody of samples. Medical professionals and technicians are obvious choices for collection site staff by virtue of their training. Regardless of the background and training of collection site staff, you should provide them with clear and unambiguous written instructions on collecting specimens. These instructions should emphasize their responsibilities to maintain the integrity of the specimen collection and transfer process and to protect the dignity and privacy of the employee providing the sample.

The direct supervisor of the employee may not serve as the collection site person for a urine test.

Chain of custody procedures ensure that each specimen is monitored throughout the collection and analysis process. This ensures that the results you receive are

from tests conducted on your employees' specimens.

Supplies. The following supplies, equipment, and documents will be needed at each collection site you use. These supplies can be provided by the laboratory with which you contract.

- **Single-Use Collection Cups**—The cups must be individually and securely wrapped and shall be unwrapped in the presence of the employee at the time of specimen collection.
- **Single-Use Specimen Bottles**—The specimen bottles should be constructed of high-density plastic or similar synthetic material with a leak-proof cap. The bottles must be capable of being shipped in appropriate packing material without leaking or breaking, and must meet the technical specifications of the carrier selected for specimen transfer. Each bottle shall be individually and securely wrapped and shall be unwrapped in front of the employee at the time of specimen collection. One bottle must be capable of holding at least 60 ml of urine.
- **Single-Use Temperature Measurement Device**—The device shall be capable of measuring temperatures within the range of 32.5 to 37.7 C/ 90.5 to 99.8 F.
- **Urine Custody and Control Form**—This form is used to document the exchanges of the specimen from the time of production by the donor until the test is completed. It documents the chain of custody and is legal evidence that the reported test results apply to the donor.

- **Tamperproof Sealing System** – Pre-printed labels and seals (or a unitary label/seal) should be provided that ensures that the specimen bottle has not been opened. The bottle must be identified with a unique identifying number identical to that appearing on the urine custody and control form.
- **Shipping Containers** – The containers should be acceptable to the carrier you will be using for transporting specimens and accompanying paperwork and should be sealable to prevent undetected tampering.
- **Writing Instruments** – An indelible pen or other instrument suitable for making permanent markings on labels and seals and for legibly completing the urine custody and control form should be provided.
- **Written Instructions** – Written instructions should be provided for collection site personnel. The instructions should describe in detail the procedures for collecting and transporting specimens, and completing the custody and control form. These instructions should be available at all times for reference and may be provided in a checklist format to allow the technician to indicate when each step in the collection process has been accomplished.

Employees subject to testing must be provided written instructions setting forth their responsibilities. Examples of employee and collection site personnel written instructions are provided in the Sample Documentation section of this chapter.

Collection Process. Specimen collection is the most critical aspect of the drug testing program. There is a greater opportunity for human error or compromising an employee's privacy and dignity in the collection process than anywhere else in the drug testing process. However, the strict maintenance of chain of custody of the specimen and personnel training can minimize the problems and number of test cancellations resulting from flawed specimen collections. Employee confidence in, and acceptance of, the testing process is enhanced when your collection is conducted with efficiency and professionalism. You should, therefore, ensure that the collection site personnel rigorously follow your guidelines for specimen collection.

An overview of key steps and criteria for the collection process follows. These steps must be followed by the collection site personnel, transit agency, or a third party hired to perform the collection process. For specific requirements, refer to 49 CFR part 40.25.

1. Make sure that only DOT urine custody and control forms are used. Some collection sites do testing for a number of clients who may require different forms.
2. Inspect the collection room before and after each specimen collection. Remove any unauthorized persons and materials that could be used to adulterate the specimen. Secure any other doors or windows opening into the collection room. Restrict access to the room while the collection is taking place.

3. Verify the identity of the employee through the use of an official photo identification card (driver's license or employee ID), or by verification by the transit agency. If identity cannot be verified, the collection should not proceed. The transit agency must be notified if the employee fails to report or arrives more than 30 minutes late for the appointment.
4. Request that the employee check his/her belongings and remove any unnecessary outer garments, including purses, briefcases, bulky outerwear (sweaters, jackets, vests, etc.). If a collection site person notices an employee attempting to tamper with a specimen (bulging or overstuffed pocket for example), the collector may request that the employee empty his or her pockets, display the items, and explain the need for them during the collection. If not needed, lock these possessions in a secure location. The employee may retain his or her wallet.
5. Have the employee rinse his or her hands with water and dry them.
6. Unwrap the collection cup or specimen bottle in front of the employee and direct the employee to the privacy enclosure. Do not enter the enclosure. Do not observe the specimen collection. Instruct the employee that at least 45 milliliters (about 1½ ounces) of urine are required and that the temperature will be taken to ensure the integrity of the sample. The donor must urinate into a collection cup or specimen bottle. Only one specimen should be collected at a time. If the agency tests for drugs other than those specified by the FTA regulation, a completely separate urine collection with its own custody and control form is required.
7. If the employee is unable to provide at least 45 ml, the collection site technician shall instruct him/her to drink not more than 24 ounces of fluids during a period of up to two hours. The employee will then attempt to provide a complete sample using a fresh collection container. If the required amount is provided, the original insufficient specimen shall be discarded. If the employee is still unable to provide an adequate specimen, the insufficient specimen shall be discarded, testing discontinued, and the employer notified. The MRO shall refer the individual for a medical evaluation to determine whether the individual's inability to provide a specimen is genuine or constitutes a refusal to submit to a drug test.
8. Within 4 minutes of receiving the specimen, record the temperature. The temperature must be between 90.5 and 99.8 F. Any specimen temperature out of that range requires that a body temperature be obtained from the donor to confirm that the sample has not been adulterated. The collection site technician must also visually examine the specimen for any unusual color or sediment, and note the results on the custody and control form.
9. If the employee refuses to cooperate with the collection process, inform the employer

representative and document the noncooperation on the urine custody and control form.

10. If a collection container is used, the collection site person, in the presence of the donor, pours the urine into two specimen bottles. Thirty (30) ml shall be poured into one bottle, to be used as the primary specimen. At least 15 ml shall be poured into the other bottle, to be used as the split specimen. If a specimen bottle is used as a collection container, the collection site person shall pour 30 ml of urine from the specimen bottle into a second specimen bottle (to be used as the primary specimen) and retain the remainder (at least 15 ml) in the collection bottle (to be used as the split specimen).
11. Both bottles must be sealed and labeled in the presence of the donor. The label(s) must be printed with the same specimen identification number as the custody and control form and are attached to the specimen bottles. The donor initials the labels verifying that the specimen is his/hers.
12. The custody and control form must be completed. The collection site technician and the donor must sign the appropriate certification statements on the form regarding authenticity of the specimen and information provided and the integrity of the collection process. Each transfer of custody must be noted on the chain of custody portion of the urine custody and control form. Every effort should be made to minimize the number of persons handling the specimen.

13. Both the primary specimen and the split specimen shall be sealed in a single shipping container, together with the appropriate pages of the custody and control form. The tape seal on the container shall bear the initials of the collection person and date of closure for shipment.
14. The specimen should be placed in secure storage until dispatched to the laboratory.

Split Sample. The urine specimen must be split and poured into two specimen bottles. This provides the employee with the option of having an analysis of the split sample performed at a separate DHHS laboratory should the primary specimen test result be verified positive. The employee has 72 hours after being informed by the MRO of a verified positive test to request a test of the split sample.

Observed Collections. Procedures for collecting urine specimens shall allow individual privacy unless there is a reason to believe that a particular individual may alter or substitute the specimen to be provided (§40.25e).

In the following circumstances, the collection personnel must observe the second collection immediately after the first collection:

- The employee has presented a urine sample that falls outside the normal temperature range (90.5 to 99.8 F) and

- The employee declines to provide a measurement of oral body temperature, or
- Oral body temperature varies by more than 1 C/1.8 F from the temperature of the specimen, or
- The collection site person observes conduct clearly and unequivocally indicating an attempt to substitute or adulterate the sample (e.g., substitutes urine in plain view, blue dye in specimen presented, etc.).

In these circumstances (previous collection events), the employer may authorize an observed collection:

- The most recent urine specimen provided by the employee (i.e., on a previous occasion) was determined by the laboratory to have a specific gravity of less than 1.003 and a creatinine concentration below 0.2 g/l, or
- The employee has previously been determined to have used a controlled substance without medical authorization and the particular test is being conducted under the FTA regulation as a return to duty or follow-up test.

A supervisor of the collection site person or a designated employer representative shall review and concur in advance with any decision by a collection site person to obtain a specimen under direct observation. The direct observation must be by a collection site person of the same gender as the employee being tested.

Specimen Rejections or Cancellations.
DOT has issued the following guidance

identifying certain errors and omissions as “fatal flaws” that should result in a specimen being rejected by the laboratory:

1. Specimen identification number on specimen bottle does not match the number on the custody and control form.
 2. Specimen identification number is omitted.
 3. Collector’s signature is omitted from certification statement.
 4. Chain of custody block is incomplete (minimum: two signatures; shipping entry; date).
 5. Employee identification number is omitted on custody and control form unless “refusal of donor to provide” is stated in remarks section.
 6. Primary specimen volume is less than 30 ml; if upon arrival at the laboratory, specimen volume is slightly below the 30 ml minimum (within 10%), the specimen may be accepted if the laboratory can ensure that sufficient volume will be available for storage and any necessary reanalyses for quality control or reconfirmation of results.
- Note: This provision does not change the DOT requirement for the donor to provide 45 ml of urine at the collection site for a split specimen collection.
7. Specimen bottle seal is broken or shows evidence of tampering.

8. Specimen shows obvious adulteration (e.g., color, foreign objects, unusual odor).

In addition, the MRO should cancel the test results when the following procedural errors have occurred but were not noted by the laboratory:

1. Donor's signature is omitted from the certification statement unless "donor refused to sign" is stated in the remarks section.
2. Certifying scientist's signature is omitted on positive results from the laboratory.

Laboratory Testing

The scientific techniques used in drug testing are virtually error-free when properly applied. The combination of immunoassay screening with confirmation by gas chromatography/mass spectrometry (GC/MS) makes the possibility of error extremely remote. In the past, most errors in test results were the result of human error in specimen handling or documentation, both of which have been reduced in recent years by using detailed test protocols and stringent quality control checks.

All drug testing under the FTA regulations must be completed in a laboratory certified by the Department of Health and Human Services (DHHS). These laboratories have been rigorously inspected and tested and meet the highest standards for analytical competence. A list of DHHS-certified laboratories (current as of the date of publication of these guidelines) is provided in Appendix D. This list is updated

Best Practices

Minimizing Cancelled Tests

After experiencing a fairly high level of cancelled tests due to errors at their collection site, a transit system program manager investigated the cause. The program manager discussed with the supervisors who transported employees to the collection site their observations and found that, due to turnover and assignment of shifts, the collection site personnel were often new and inexperienced in the DOT collection process. As a result, they made errors in completing the custody and control forms. The problems were brought to the attention of the collection site management and, together, modifications were made to the collection process to minimize the number of future cancellations. In addition, the supervisors were provided with additional training so that they could recognize and point out problems to the collection site personnel as they were occurring. The supervisors also had extra copies of the custody and control form and collection process checklist in case the collection staff was unfamiliar with the process or did not have the appropriate forms. As a result, the number of fatal flaws in the collection process was significantly reduced.

on a monthly basis, and current lists are printed in the *Federal Register*.

Each transit system should enter into a contract for primary laboratory services that specifically states the activities to be performed and the cost for such services. Transit systems should also enter into a contract with a second laboratory for split sample analysis and to serve as a backup in case problems arise with the other lab.

The DOT regulation requires an immunoassay test as the initial test. If any

prohibited drug registers above the cutoff level on the immunoassay screen, an aliquot of the same urine specimen must be confirmed by using a technique called gas chromatography/mass spectrometry (GC/MS).

The initial test result is based on the ability of antibodies to recognize drugs in biological fluids. Immunoassay tests, called screens, are simple to run, are often automated, and are relatively inexpensive.

The confirmatory tests are more accurate, more time consuming, require sophisticated laboratory equipment, and thus are more expensive than immunoassay screens. The only confirmatory test permitted by 49 CFR part 40 is GC/MS.

Laboratory Standards. Each transit system must ensure that its laboratory meets the following standards for analytical drug testing:

- The laboratory must be DHHS certified.
- The laboratory must use an immunoassay technique to screen urine specimens for the specific drugs.
- The laboratory must confirm all positive screens with GC/MS.
- All confirmed positive specimens must be retained by the laboratory for a minimum of one year.
- The laboratory must provide secure storage for the split sample. If directed by the MRO, the laboratory shall forward the split specimen bottle, with seal intact, a copy of the

MRO request, and the split specimen copy of the custody and control form to a different DHHS-approved laboratory.

- Prior to finalizing the contract with the laboratory, the drug and alcohol program manager and employee representative may want to personally inspect the laboratory.
- Although the regulations permit a 5-working-day turnaround on test results, you may wish to negotiate shorter turnarounds such as 48 hours for negative results and 72 hours for positive results.
- The laboratory must provide periodic summation reports consistent with 49 CFR part 40 reporting requirements to the transit system.



Medical Review Officer

The FTA regulation requires that all drug testing laboratory results must be reviewed by a qualified MRO. The purpose of this review is to verify and validate test results.

An MRO is defined in the regulation as a licensed physician responsible for receiving laboratory results generated by an employer's drug testing program who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's confirmed positive test result together with his or her medical history and any other relevant biomedical information.

The MRO is required to perform the following functions (§40.33):

- Receive the results of drug tests from the laboratory.
- Conduct administrative review of the control and custody form to ensure its accuracy.
- Review and interpret an individual's confirmed positive test by (1) reviewing the individual's medical history, including any medical records and biomedical information provided; (2) affording the individual an opportunity to discuss the test result; and (3) deciding whether there is a legitimate medical explanation for the result, including legally prescribed medication.
- If appropriate, request the laboratory to analyze the original specimen again to verify the accuracy of the test result reported.
- Notify each employee who has a verified positive test that the employee has 72 hours in which to request a test of the split specimen. If the employee requests an analysis of the split specimen within 72 hours of having been informed of a verified positive test, the MRO shall

direct, in writing, the laboratory to ship the split specimen to another DHHS-certified laboratory for analysis.

- If the analysis of the split specimen fails to confirm the presence of the drug(s) or drug metabolite(s) found in the primary specimen, or if the split specimen is unavailable or inadequate for testing, the MRO shall cancel the test and report the cancellation and the reasons for it to the DOT, the employer, and the employee.
- If the employee has not contacted the MRO within 72 hours of being notified of a verified positive drug test, the employee may present to the MRO information documenting that serious illness, injury, inability to contact the MRO, lack of actual notice of the verified positive test, or other circumstances unavoidably prevented the employee from contacting the MRO in time.
- If the MRO concludes that there is a legitimate explanation for the employee's failure to contact the MRO within 72 hours, the MRO shall direct that the analysis of the split specimen be performed.
- If the MRO concludes that there is no legitimate explanation for the employee's failure to contact the MRO within 72 hours, then the MRO is not required to direct the analysis of the split specimen to be performed.
- If, after the MRO makes all reasonable efforts (and documents them), the MRO is unable to reach the individual directly, the MRO shall contact the designated employer representative who shall direct the

individual to contact the MRO as soon as possible. If, after making all reasonable efforts, the designated management official is unable to contact the employee, the employer may place the employee on temporary unqualified status or medical leave.

- Report each verified test result to the person designated by the transit agency to receive results. Reporting of a verified positive result is not delayed pending the split specimen analysis.
- Maintain all necessary records and send test result reports to the transit agency's drug and alcohol program manager.
- Protect the employees' privacy and testing program confidentiality.

Not all physicians have specific experience in interpreting laboratory data as they specifically relate to substance abuse. Physicians who specialize in industrial medicine, consulting physicians to drug and alcohol treatment programs, and physicians who have had experience with drug testing programs in the military or in a residency program are excellent resources.

National associations, including American Medical Association affiliated organizations, offer certification programs for Medical Review Officers.

When selecting a qualified MRO, you should

1. Review qualifications, medical license, memberships, and other

relevant training and experience to ensure minimum standards are met

2. Have the MRO describe his or her methods for remaining informed of MRO policies and practices (e.g., attending conferences, additional training, memberships, newsletters, etc.)
3. Check references for similar work performed
4. Assess ability to work with collection sites, testing laboratories, substance abuse professionals, and individual employees; assess the proposed method of notifying employees of verified positive test results and the method used to afford employees the opportunity to discuss test results
5. Assess the availability and cost for expert testimony for associated court cases; assess the cost and procedures used by the MRO to conduct quality control testing (blind samples) on behalf of the transit system; and
6. If not based locally, have the MRO indicate how interviews with employees will be conducted and how the MRO will coordinate with the transit system program manager and local substance abuse professionals.

When the services of an MRO have been retained, you should

- Describe procedures for disclosure of verified positive test results to the employer and the confidentiality that is required for medical information not specifically related to use of drugs

- Describe the specimen collection procedures, collection sites, laboratories, and chain of custody procedures and provide them to the MRO
- Provide the MRO with copies of 49 CFR parts 40 and 653 (1989 and 1994 editions)
- Provide the MRO with a copy of the *U.S. Department of Transportation Drug Testing Procedures Handbook: Medical Review Officer Guide*; and, specify reporting procedures and recordkeeping requirements.

Substance Abuse Professional

The FTA regulation (§653.63) requires that any individual who has a verified positive drug test result must be immediately removed from his or her safety-sensitive job duties. In addition, he or she must be advised of the resources available to evaluate and resolve problems associated with drug abuse, including the names, addresses, and telephone numbers of substance abuse professionals and counseling and treatment programs. The employee must also be evaluated by a Substance Abuse Professional (SAP) who shall determine what assistance, if any, the employee needs in resolving problems associated with prohibited drug use.

Even if your policy stipulates termination of an employee who receives a verified positive drug test, you must afford the employee the opportunity to be evaluated by an SAP.

An SAP can be (1) a licensed physician (Medical Doctor or Doctor of Osteopathy),

or a licensed or certified psychologist, social worker, or employee assistance professional, with knowledge of and clinical experience in the diagnosis and treatment of drug- and alcohol-related disorders; or (2) an addiction counselor certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission.

The role of the SAP is to

- Evaluate whether a safety-sensitive employee who has refused to submit to a drug test or who has a verified positive drug test result is in need of assistance in resolving problems associated with prohibited drug use.
- Evaluate whether a safety-sensitive employee who has a verified positive drug test result has complied with the SAP's recommendations.
- Recommend the number of months the returning safety-sensitive employee will be subject to follow-up testing after returning to duty (after the minimum six tests during the first 12 months).
- Recommend whether the employee should also be subject to return to duty and follow-up alcohol testing in accordance with 49 CFR part 40.

MROs, other physicians, community mental health centers, Employee Assistance Programs, universities, and private practitioners may provide you with a list of possible SAPs.

Potential SAPs should provide documentation of their credentials and a summary of their assessment and referral

procedures. The SAP should also provide a list of the treatment options available and the frequency with which each is recommended. The employer is responsible to ensure that an SAP who determines that a covered employee requires assistance in resolving problems with substance abuse does not refer the employee to the SAP's private practice from which the SAP receives remuneration or to a person or organization in which the SAP has a financial interest. A contract should be negotiated that states the specific requirements for the SAP as defined in 49 CFR parts 653 and 654, and the associated cost. The contract may be with the SAPs themselves or with their employers.

A primary SAP should be selected who will have responsibility for providing services to your employees. This professional should be encouraged to learn about your operations and the safety-sensitive functions that your employees perform. Such knowledge will be a major asset when assessing the needs of your employees and their ability to perform safety-sensitive duties. Backup SAPs should also be selected to provide assessments when the primary SAP is not available.

Confidentiality. The confidentiality of drug and alcohol testing information is a critical concern to all of those tested. Inadvertent disclosure of the name of employees who were tested or their test results may result in legal action against the transit agency. A more detailed discussion of confidentiality is found in Chapter 9, Section 2.

Section 2. DRY RUN OF THE PROGRAM

You should begin your actual drug and alcohol program with a dry run period, and then, after all is in order, implement the actual program. Do not allow a gap between the dry run of the program and the actual implementation.

There are many elements of a drug and alcohol program you may not have encountered in the course of running a transit agency, such as collecting employee's specimens, dealing with potentially hostile employees, and the logistical requirements of notifying employees that they are to be tested and making provisions for their replacements.

Dry runs have been used at a number of transit agencies that already have a drug and alcohol program. Several of those agencies describe the dry run as the most important element in successful implementation. Advantages of a dry run include

- Giving supervisors and employees an understanding of how the program will actually work and, therefore, reducing apprehension
- Giving the transit agency the chance to identify and fix any bugs or kinks in the program without liability
- And, perhaps most importantly, giving a clear signal to employees that the actual testing is about to begin and, therefore, encouraging employees to stop using drugs or to seek voluntary rehabilitation.



Your dry run should begin after your supervisors and employees are trained. Announce that a dry run will last for a set time to be followed immediately by full implementation. Tell your supervisors and employees that the dry run will be exactly the same as the actual program except that the specimens collected from employees will not be analyzed and no personnel action will result.

After collecting the specimen, it should be disposed of in view of the employee to assure the employee that the sample will not be sent to the laboratory. You should use quality control samples to test the logistics of getting specimens to the laboratory and getting reports back from your MRO.

Quality samples are discussed in Chapter 6, Section 7.

Clearly announce the changeover from the dry run to actual implementation. FTA regulations prohibit any provisions of the FTA drug and alcohol programs from being implemented before January 1, 1995, for large operators, or January 1, 1996, for small operators.

Section 3. FULL IMPLEMENTATION

You should announce the starting date of actual testing at the same time that you begin your dry run. This will allow

employees to take full advantage of your EAP and voluntary rehabilitation programs.

Because your dry run should have worked out any problems with your drug and alcohol program, implementing actual

testing should be the easiest part of this whole process. Continue what you were doing, but begin shipping employees' urine specimens to the laboratory with subsequent review by the MRO.

Sample Documentation

Collection Site Checklist

(To be used by Specimen Collection Personnel)

1. Verify the identity of the employee through the use of an official picture identification or verification by a transit official. Notify the transit agency if the employee fails to report or arrives late.
2. If the employee providing the specimen requests it, present your identification as well.
3. Request that the employee check his/her belongings, including unnecessary outer garments, purses and briefcases. The employee may retain his/her wallet. If the employee requests it, provide a receipt for his/her personal belongings.
4. Request the employee to rinse his/her hands with water and dry them.
5. Provide the employee with a specimen bottle and direct him/her to the privacy enclosure. Do not enter the enclosure. You should not observe the specimen collection unless special circumstances exist. Instruct the employee that at least 45 milliliters of urine are required and that the temperature will be taken to ensure the integrity of the sample.
6. If the employee refuses to provide a specimen, or otherwise fails to cooperate with the process, inform the employer and document the refusal on the custody and control form.
7. If the employee is unable to provide at least 45 milliliters, the original specimen shall be discarded and the employee will be instructed to drink not more than 24 ounces of fluid in a period of up to two hours. If 45 milliliters cannot be provided within the two-hour limit, notify the transit agency.
8. After providing the specimen, allow the employee to wash his/her hands.
9. Measure the temperature of the specimen. If the temperature of the specimen is outside the acceptable range (90.5 to 99.8 F), the collection site person will require the employee to have his/her oral temperature taken to counter any suspicion of tampering with or substitution of the specimen. Note the temperature in the appropriate place on the custody and control form.
10. If there is any reason to suspect adulteration or substitution, notify a higher level supervisor, have a same-gender technician directly observe the collection of a second specimen, note the unusual behavior on the custody and control form, and submit both specimens for testing.
11. Pour the first 30 ml of urine into the specimen bottle for the original specimen. Up to 15 ml is to be used for the split specimen.
12. Keep the specimens in view at all times prior to sealing and labeling. The specimen must also be in view of the employee.

Collection Site Checklist

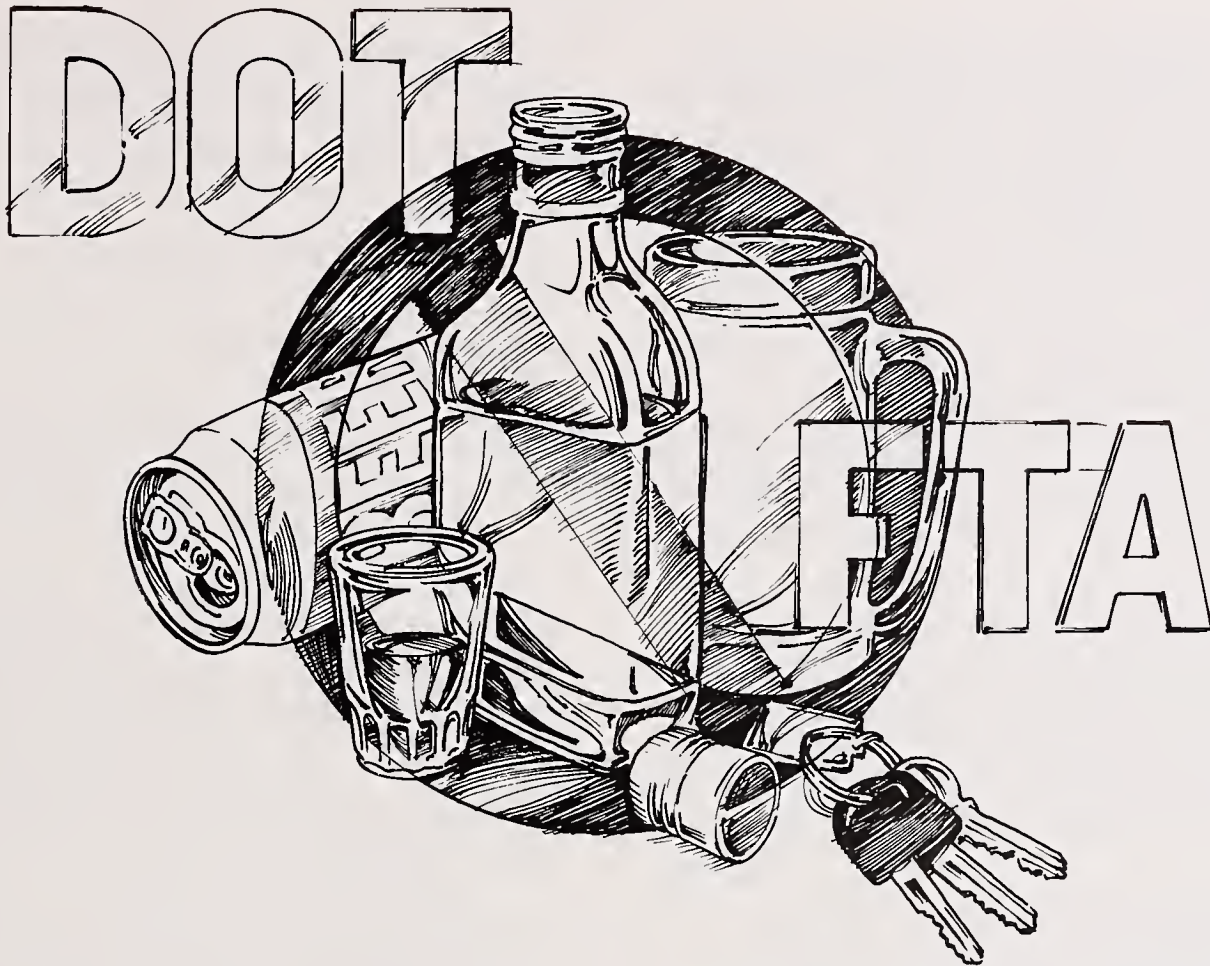
(To be used by Specimen Collection Personnel)
(Continued)

13. Seal and label the specimens in view of the employee. Record the date on the specimen label. Have the employee initial the label verifying that the specimens are his/hers.
14. Complete the custody and control form ensuring that you and the employee have signed the appropriate certification statements. Document receipt and release of specimen and shipment courier in chain of custody section of the form.
15. Place the specimens and the copies of the custody and control form in a container suitable for shipment and seal. Initial the seal and record the time and date of closure for shipment.
16. Store all specimens in a secure location until shipment.
17. Ship the specimens to the laboratory using the designated courier.

Employee Specimen Collection Checklist

(For Employees Required to Provide Urine Specimens for Drug Testing)

1. Report to the specimen collection site as soon as possible after notification to report. Refusal to report for collection or refusal to cooperate with the collection process will result in a determination of a refusal to provide a specimen.
2. Show the collection site personnel an official photo identification card.
3. Check your outer garments with the collection site personnel for safekeeping. You have the right to retain your wallet and to ask for a receipt for your belongings.
4. Rinse and dry your hands.
5. Obtain a wrapped specimen container from the specimen collection personnel.
6. Proceed to the privacy enclosure and provide a specimen in the collection container. At least 45 milliliters of urine are required for analysis. If an insufficient amount of urine is provided, the original specimen will be discarded and you will be required to consume not more than 24 ounces of fluids in two hours to provide another specimen. Do not tamper with the specimen or make substitutions. The specimen will be visually inspected for unusual color and sediment.
7. The temperature of the specimen will be measured and must fall within an acceptable range. If the temperature falls outside the acceptable range, you will be required to provide an oral temperature to counter any suspicion of tampering.
8. Give the specimen to the specimen collection personnel and watch the sealing and labeling of the bottles. Initial the labels verifying that the specimen is yours.
9. You may wish to indicate on the back of your copy of the custody and control form any medications you are currently using. This list may serve as a memory jogger in the event a Medical Review Officer calls you to discuss the results of your test.
10. The results of the laboratory analysis will be forwarded to your employer's Medical Review Officer. If the results are negative (no drugs detected), the MRO will notify your employer. If the laboratory confirms a positive result (drugs detected), the MRO will contact you at the telephone number you provided to give you the opportunity to discuss the test results and to submit information demonstrating authorized use of the drugs in question.



Chapter 8.

ALCOHOL TESTING PROCEDURES

Section 1. OBTAINING PROGRAM SERVICES

When establishing an effective alcohol program, you will need to perform certain specialized services. You will need someone to

- Operate the testing equipment
- Report the results
- Assess employees who test positive (unlike the drug testing requirements, the alcohol rule does not require the use of an MRO).

You will need to have access to equipment to perform the tests.

If you do not have qualified individuals on staff to perform these functions, or have the equipment available, you will need to identify qualified contractors to provide each of these services. A cost analysis model is provided in Chapter 12, "Business Analysis," to assist you in determining the estimated costs for these services based on the number of safety-sensitive employees.

Alcohol Testing

The FTA regulation (49 CFR part 654) requires that you conduct breath alcohol testing on safety-sensitive employees consistent with the provisions set forth in 49 CFR part 40. The breath specimen must be collected through the use of an evidential

breath testing device (EBT) that is approved by the National Highway Traffic Safety Administration (NHTSA). The test must be performed by a breath alcohol technician (BAT).

The FTA regulation prohibits any employer from allowing an employee with an alcohol concentration of 0.04 or greater to perform any safety-sensitive duties until he/she has been evaluated by an SAP and has passed a return to duty test. An employee with a alcohol concentration of 0.02 or greater but less than 0.04 must be removed from duty for eight (8) hours or until a retest shows an alcohol concentration of less than 0.02.

Evidential Breath Testing Device (EBT) (§40.53). An EBT is a breath testing device that is capable of measuring an employee's alcohol concentration. It must be able to distinguish alcohol from acetone at the 0.02 alcohol concentration level. An EBT must be capable of conducting an airblank and performing an external calibration check. For confirmation tests, employers shall use EBTs that can

- Produce a printed result in triplicate or three consecutive identical copies of each breath test.
- Print a unique and sequential number of each completed test, with the BAT and the employee being able to read the number before each test, and print the number on each copy of the result.
- Print, on each copy of the result, the manufacturer's name for the device, the device's serial number, and the time of the test.

For screening tests, a logbook must be used in conjunction with any EBT that does not meet the following requirements:

- Print triplicate results
- Assign unique and sequential test numbers
- Print the manufacturer's name for the device, the device's serial number, and the time of the test.

A separate logbook must be used for each device. The logbook must include columns for the test number, date of the test, name of the BAT, location of the test, quantified test result, and initials of the employee taking each test.

The EBT must have a manufacturer-developed quality assurance plan approved by NHTSA. The plan must include

- A designated method or methods to be used to perform external calibration checks of the device
- Specified minimum intervals for performing external calibration checks of the device that account for different frequencies of use, environmental conditions (e.g., temperature, altitude, humidity), and contexts of operation (e.g., stationary or mobile use)
- Specified tolerances on an external calibration check within which the EBT is regarded to be in proper calibration
- Specified inspection, maintenance, and calibration requirements and intervals for the device.

NHTSA will occasionally print updates to their Conforming Products List (CPL) of EBTs in the *Federal Register*. A list of approved EBTs (as of this manual's publication) is provided in Appendix E.

The regulation specifically requires that the employer comply with the NHTSA-approved quality assurance plan by ensuring that the external calibration checks of each EBT are performed as described in the manufacturer's plan and that the EBT will be taken out of service if any external calibration check results in a reading outside the tolerances for the EBT. The EBT cannot be placed back into service until it has been repaired and has had an acceptable external calibration check. The employer must also ensure that the inspection, maintenance, and calibration of each EBT is performed by the manufacturer or a maintenance representative certified by the device's manufacturer or an appropriate State agency. The employer must also maintain records of the external calibration checks of the EBT and store the EBT in a secure place when not being used.

Provisions should be made for a backup EBT for times when the primary EBT is unavailable, out of calibration, or being serviced. This could include acquiring a second instrument, arranging for a "loaner," or arranging to use another transit agency's EBT when necessary.

Breath Alcohol Technician (40.51).

The alcohol tests must be performed by a breath alcohol technician who is "trained to proficiency" in the operation of the EBT he/she is using and in the alcohol testing

procedures specified in the regulations. The BAT must successfully complete a NHTSA-approved course of instruction that provides training in the principles of EBT methodology, operation, and calibration checks. In addition, the BAT must complete training on the fundamentals of breath analysis for alcohol content, the procedures required for obtaining a breath specimen, and interpreting and recording EBT results.

The BAT must demonstrate competence in the operation of the specific EBT he/she will use. The BAT will be required to receive additional training as new or additional devices or technology are introduced.

The transit system must identify the individual(s) that will serve as its BAT(s). If one BAT is selected as the primary EBT operator, provisions should be made for backup services. The transit system is required to document the training and proficiency testing of the BAT who tests its employees.

The supervisor of an employee to be tested for alcohol misuse must not serve as the BAT for that employee's test.

Law enforcement officers who have been certified by State or local governments to conduct breath alcohol testing are deemed to be qualified as BATs. In order for a test conducted by such an officer to be accepted under FTA alcohol testing requirements, the officer must have been certified by a State or local government to

use the particular EBT that was used for the test.

Alcohol Testing Site (§40.57). Alcohol tests should be conducted at a site that provides privacy to the individual being tested. The testing site must be secured with no unauthorized access at any time the EBT is unsecured or when testing is occurring. The BAT must conduct only one test at a time and must not leave the testing site while the preparations for testing or the test itself are in progress. An employer may use a mobile collection facility (e.g., a van equipped for alcohol testing) if that facility meets the privacy requirements mentioned above.

In unusual circumstances (e.g., accident) an alcohol test can be conducted at a place other than an alcohol testing site. In such cases, the BAT shall conduct the test in a manner that provides the employee with privacy to the greatest extent practicable.

The EBT can be purchased and operated directly by the transit system or any component(s) of the breath testing services can be purchased from a for-profit or non-profit entity. If possible, the alcohol test should be performed at the same location used for urine collection for drug tests to minimize the time and logistical problems associated with the collection process, particularly when an employee will be taking both an alcohol and a drug test (e.g., pre-employment, post-accident). Other possible locations include other transit system facilities and facilities available at other transportation employers that fall under the

DOT regulations (e.g., trucking firms, school bus operations, or other agencies that have drivers holding CDLs).

The number, location, and availability of alcohol breath testing services may be limited at first and the costs may be high. But, as the demand increases with the implementation of the regulation across all modes, the availability of services is expected to increase and costs decline. You may wish to join forces with other transportation employers in your region to purchase EBT and BAT services as a group (see Chapter 11, "Joining a Consortium").

In anticipation of the need for alcohol testing services, the following procedures should be followed:

1. Develop specifications for EBT and BAT services consistent with 49 CFR part 40. Estimate the number and types of tests to be performed and their approximate frequency throughout the year. Specify the hours of required availability and the need for backup equipment and trained personnel.
2. Confer with other employers who must purchase alcohol testing services to satisfy DOT regulations to identify potential contractors and consortia (private and public) for testing services.
3. Investigate the current and potential availability of EBT and BAT services in the local community and evaluate the level of interest in the provision of testing services.
4. As soon as possible, select an alcohol collection site. If possible, the

alcohol specimen collection site should be the same as the drug specimen collection site. Try to select a neutral facility. Law enforcement agencies are not recommended as collection sites in order to avoid any perception of testing as a "police" action.

5. Develop a contract that specifies the obligation of the collection site to maintain equipment quality standards and BAT proficiency training consistent with 49 CFR part 40 throughout the duration of the contract. Require that sufficient records of the quality control measures, equipment calibration, and proficiency training are provided for documentation of the transit system's program.

Alcohol Breath Testing Process

The following procedures must be used to conduct the test.

Preparation (§40.61). Upon arrival at the alcohol collection site, the employee must provide positive identification to the BAT. The identification can be in the form of a company identification card, driver's license, or identification by an employer representative.

After the testing procedures are explained to the employee, the employee and the BAT must complete, date, and sign the alcohol testing form. The employee and the BAT sign the form indicating that the employee is present and providing a breath specimen. Employers may not modify or revise this form, unless the form is directly generated by an EBT (i.e., the space for affixing a separate printed result

is omitted). The form must provide triplicate (or three consecutive identical) copies. Copy 1 (white) must be retained by the BAT. Copy 2 (green) must be provided to the employee. Copy 3 (blue) must be transmitted to the employer. Except for a form generated by an EBT, the form shall be 8-½ by 11 inches in size. The form may be found in the Sample Documentation section of this chapter.

Screening Test (§40.63). The BAT will inform the employee of the need to conduct a screening test. The BAT must open an individually sealed, disposable mouthpiece in view of the employee and attach it to the EBT.

The BAT will instruct the employee to blow forcefully into the mouthpiece for at least six seconds or until an adequate amount of breath has been obtained. Following the screening test, the BAT must show the employee the result displayed on the EBT or the printed result.

If the result of the screening test is an alcohol concentration of less than 0.02, no further testing is required and the test will be reported to the employer as a negative test. The employee may then return to his/her safety-sensitive position.

Confirmation Test (§40.65). If the result of the screening test is an alcohol concentration of 0.02 or greater, a confirmation test must be performed.

The confirmation test must be conducted at least 15 minutes, but not more than 20 minutes, after the completion of

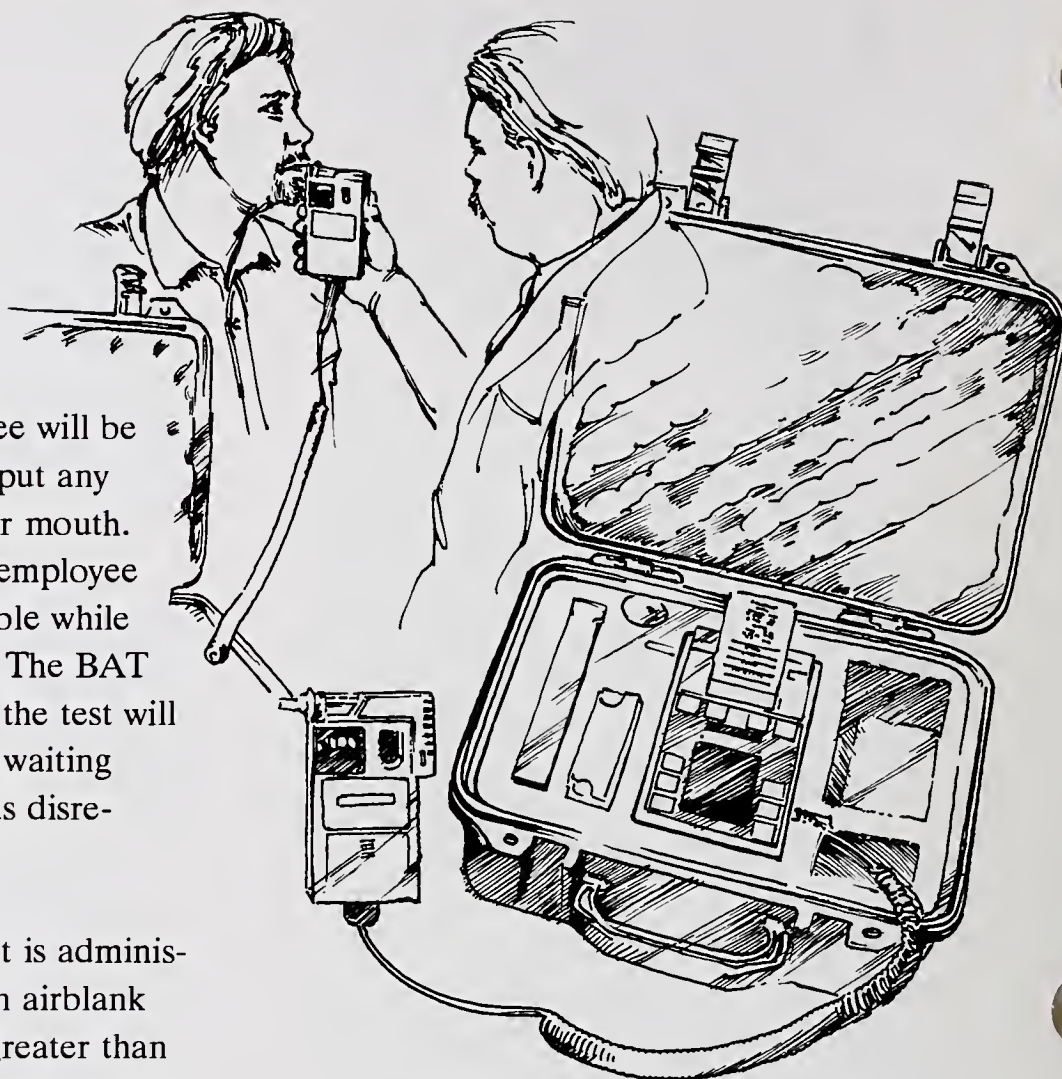
the initial test. This delay prevents any accumulation of alcohol in the mouth from leading to an artificially high reading. The BAT will inform the employee of the need to conduct a confirmation test. The employee will be instructed not to eat, drink, or put any object or substance in his or her mouth. The BAT will also instruct the employee not to belch to the extent possible while awaiting the confirmation test. The BAT must inform the employee that the test will be conducted at the end of the waiting period, even if the employee has disregarded the instructions.

Before the confirmation test is administered, the BAT shall conduct an airblank on the EBT. If the reading is greater than 0.00, the BAT shall conduct one more airblank. If the second airblank reading is greater than 0.00, the EBT must not be used to conduct the test.

The confirmation test is conducted using the same procedures as the screening test. A new mouthpiece will be used.

If the initial and confirmatory test results are not identical, the confirmation test result is deemed to be the final result.

If the result displayed on the EBT is not the same as that on the printed form, the test will be cancelled, and the EBT removed from service.



The BAT will sign and date the form. The employee will sign and date the certification statement, which includes a notice that the employee cannot perform safety-sensitive duties or operate a motor vehicle if the results are 0.02 or greater. The BAT will attach the alcohol test result printout directly onto the alcohol collection form with tamperproof tape (unless the results are printed directly on the form).

Reporting. The BAT will transmit all results to the employer's designated representative in a confidential manner (in writing, in person, by telephones or other electronic means). In the event an individual must be removed from safety-sensitive

duties, the BAT will notify the employer's representative immediately.

Incomplete Tests (§40.67). If a screening or confirmatory test cannot be completed, the BAT must, if practicable, begin a new test using a new alcohol testing form with a new sequential test number.

Refusal by an employee to complete and sign the alcohol testing form, to provide breath, to provide an adequate amount of breath, or otherwise to cooperate with the collection process must be noted on the form and the test will be terminated.

If an employee attempts and fails to provide an adequate amount of breath, the BAT must note this on the form and immediately inform the employer. The employer shall direct the employee to obtain, from a licensed physician who is acceptable to the employer, an evaluation concerning the employee's medical ability to provide an adequate amount of breath. The evaluation should be made as soon as practical after the attempted breath test. If the physician indicates that there was a valid medical reason for the inadequate amount of breath, the employee's failure to provide an adequate amount of breath will not be considered a refusal. If no valid medical reason is determined, the inadequate amount of breath must be considered a refusal to take the test.

Test Accuracy. To protect the integrity of the test and to ensure accurate results, the procedures for conducting an alcohol breath test are rigorous. Alcohol tests are

considered invalid when the following occurs:

- The external calibration check of the EBT produces a result outside the allowed tolerance levels.
- A device other than an NHTSA-approved EBT is used.
- The BAT does not wait 15 minutes between the screening and confirmatory tests.
- A valid airblank test that registers 0.00 is not performed before each confirmation test.
- The alcohol test form with the attached EBT printout is not completed correctly. Employee and BAT signatures, or relevant BAT remarks, should be included.
- The EBT fails to print the confirmation results, the sequential test number on the EBT is not the same as the number on the printout, or the alcohol concentration displayed on the EBT is different from what is printed out.

Substance Abuse Professional

The FTA regulations require that any individual who has a breath alcohol concentration of 0.04 or greater must be immediately removed from his/her safety-sensitive position. In addition, he/she must be advised of the resources available to evaluate and resolve problems associated with alcohol misuse, including the names, addresses, and telephone numbers of substance abuse professionals and counseling and treatment programs. The employee must also be assessed by an SAP who must

determine what assistance, if any, the employee needs in resolving problems associated with alcohol misuse.

An SAP is (1) a licensed physician (Medical Doctor or Doctor of Osteopathy), or a licensed or certified psychologist, social worker, or employee assistance professional with knowledge of and clinical experience in the diagnosis and treatment of alcohol-related disorders; or (2) an addiction counselor certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission. The SAP must carry out the following responsibilities:

- Evaluate whether each safety-sensitive employee who has an alcohol test result of 0.04 or greater or has refused to submit to an alcohol test is in need of assistance in resolving problems associated with alcohol misuse.
- Evaluate whether each safety-sensitive employee who previously tested positive and wants to return to work has properly followed the SAP's recommendations for treatment.
- Determine the number of months a returning safety-sensitive employee will be subject to follow-up alcohol testing after returning to duty (after the minimum six tests required during the first 12 months).
- Recommend whether a returning employee should also be subject to return to duty and/or follow-up testing for drug use.

SAPs may not provide treatment to employees whom they have assessed. Nor may SAPs have any financial or other ties to treatment providers who are treating employees the SAP referred.



Potential SAPs should provide documentation of their credentials and a summary of their assessment and referral procedures. The SAP should also provide a list of the treatment options available and the frequency with which each is recommended. A primary SAP and a backup SAP should be selected. A contract should be negotiated that states the specific requirements for the SAP as defined in 49 CFR 654 and the associated cost for the services. The contract may be with the individuals or with a company that provides the SAP services.

A primary SAP should be selected to provide services to your employees. This professional should be encouraged to learn about your operations and the safety-sensitive functions that your employees perform. This knowledge will be a major asset when assessing the needs of your employees and their ability to perform safety-sensitive job duties. Backup SAPs should

also be selected to provide assessments when the primary SAP is not available.

Section 2. ALCOHOL-RELATED CONDUCT

In addition to stipulating the consequences of an alcohol test result of 0.02 or greater, employers should clearly specify in their company plan other employee actions which are prohibited by the FTA regulation. Prohibited employee conduct includes

- Using alcohol while performing safety-sensitive functions

- Using alcohol within four hours prior to performing safety-sensitive functions
- Performing a safety-sensitive function with an alcohol concentration of 0.04 or greater
- Using alcohol within eight hours following an accident which requires the employee to take an alcohol test, unless the employee has already taken a post-accident alcohol test.

Employers must not permit a safety-sensitive employee to perform a safety-sensitive function if that employee has violated any of the provisions above.



Section 3. DRY RUN OF THE PROGRAM

You should begin your actual drug and alcohol program with a dry run period, and then, after all is in order, implement the actual program. Do not allow a gap between the dry run of the program and the actual implementation.

A detailed discussion of how to do a dry run can be found in Chapter 7, "Drug Testing Procedures," Section 2. The only difference between the dry run of the alcohol program is the specimen collection procedure. In the dry run of the drug program, the urine specimen was collected but then disposed of in clear view of the employee. For the alcohol dry run, the "air blank" will still be performed on an operating EBT, but the breath sample from the employee should be blown into the EBT after the machine is turned off. As with the drug dry run, this assures the employee that the specimen will not be analyzed, yet allows you to trial run all the necessary procedures.

Section 4. FULL IMPLEMENTATION

You should announce the starting date of actual testing at the same time that you begin your dry run. This will allow employees to take full advantage of your EAP and voluntary rehabilitation programs.

Because your dry run should have worked out any problems with your drug and alcohol program, implementing actual testing should be the easiest part of this whole process. Continue what you were doing, but leave the EBT running after analyzing the air blank.

Sample Documentation

U.S. Department of Transportation (DOT) Breath Alcohol Testing Form

[THE INSTRUCTIONS FOR COMPLETING THIS FORM ARE ON THE BACK OF COPY 3]

STEP 1: TO BE COMPLETED BY BREATH ALCOHOL TECHNICIAN

A. Employee Name _____
(PRINT) (First, M.I., Last)

B. SSN or Employee ID No. _____

C. Employer Name, _____
Address, & _____
Telephone No. _____

() _____
Telephone Number

D. Reason for Test: ☐ Pre-employment ☐ Random ☐ Reasonable Suspicion/Cause ☐ Post-accident ☐ Return to Duty ☐ Follow-up

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to breath alcohol testing required by U.S. Department of Transportation regulations and that the identifying information provided on this form is true and correct.

Signature of Employee

_____/_____/_____
Date Month Day Year

STEP 3: TO BE COMPLETED BY BREATH ALCOHOL TECHNICIAN

I certify that I have conducted breath alcohol testing on the above named individual in accordance with the procedures established in the U.S. Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing devices identified, and that the results are as recorded.

Screening test: Complete only if the testing device is not designed to print the following.

Test No.	Testing Device Name	Testing Device Serial Number	Time	AM PM	Result
----------	---------------------	------------------------------	------	----------	--------

Confirmation test: Confirmation test results MUST be affixed to the back of each copy of this form.

Remarks: _____

(PRINT) Breath Alcohol Technician's Name (First, M.I., Last)

Signature of Breath Alcohol Technician

_____/_____/_____
Date Month Day Year

STEP 4: TO BE COMPLETED BY EMPLOYEE

I certify that I have submitted to breath alcohol testing and the results are as recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment if the results are 0.02 or greater.

Signature of Employee

_____/_____/_____
Date Month Day Year

**AFFIX SCREENING TEST RESULTS HERE
(IF APPLICABLE)**

USE TAMPER-EVIDENT TAPE

AFFIX CONFIRMATION TEST RESULTS HERE

USE TAMPER-EVIDENT TAPE

PAPERWORK REDUCTION ACT NOTICE (as required by 5 CFR 1320.21)

Public reporting burden for this collection of information is estimated for each respondent to average: 1 minute/employee, 4 minutes/Breath Alcohol Technician. Individuals may send comments regarding these burden estimates, or any other aspect of this collection of information, including suggestions for reducing the burden, to U.S. Department of Transportation, Drug Enforcement and Program Compliance, Room 9404, 400 Seventh St., SW, Washington, D.C. 20590 or Office of Management and Budget, Paperwork Reduction Project, Room 3001, 725 Seventeenth St., NW, Washington, D.C. 20503.

U.S. Department of Transportation (DOT) Breath Alcohol Testing Form

[THE INSTRUCTIONS FOR COMPLETING THIS FORM ARE ON THE BACK OF COPY 3]

► STEP 1: TO BE COMPLETED BY BREATH ALCOHOL TECHNICIAN

A. Employee Name _____
(PRINT) (First, M.I., Last)

B. SSN or Employee ID No. _____

C. Employer Name, _____
Address, & _____
Telephone No. _____

() _____
Telephone Number

D. Reason for Test: ☐ Pre-employment ☐ Random ☐ Reasonable Suspicion/Cause ☐ Post-accident ☐ Return to Duty ☐ Follow-up

► STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to breath alcohol testing required by U.S. Department of Transportation regulations and that the identifying information provided on this form is true and correct.

Signature of Employee

Date ____/____/____
Month Day Year

STEP 3: TO BE COMPLETED BY BREATH ALCOHOL TECHNICIAN

I certify that I have conducted breath alcohol testing on the above named individual in accordance with the procedures established in the U.S. Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing devices identified, and that the results are as recorded.

Screening test: Complete only if the testing device is not designed to print the following.

Test No.	Testing Device Name	Testing Device Serial Number	Time	Result
			AM PM	

Confirmation test: Confirmation test results MUST be affixed to the back of each copy of this form.

Remarks: _____

(PRINT) Breath Alcohol Technician's Name (First, M.I., Last)

Signature of Breath Alcohol Technician

Date ____/____/____
Month Day Year

► STEP 4: TO BE COMPLETED BY EMPLOYEE

I certify that I have submitted to breath alcohol testing and the results are as recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment if the results are 0.02 or greater.

Signature of Employee

Date ____/____/____
Month Day Year

**AFFIX SCREENING TEST RESULTS HERE
(IF APPLICABLE)**

USE TAMPER-EVIDENT TAPE

AFFIX CONFIRMATION TEST RESULTS HERE

USE TAMPER-EVIDENT TAPE

Privacy Act Statement

(applicable in those cases where completed Breath Alcohol Testing Forms are retained in a Federal Privacy Act system of records)

Except for your Social Security Number (SSN), submission of the information on the front side of this form is mandatory. Incomplete submission of the information, failure to provide an adequate breath specimen for testing without a valid medical explanation, engaging in conduct that clearly obstructs the testing process, or failure to sign the certification statements on the front side of this form may result in delay or denial of your application for employment/appointment, your inability to resume performing safety-sensitive duties, removal from a safety-sensitive position, or other disciplinary action.

The authority for obtaining the breath specimen required by the U.S. Department of Transportation is the Omnibus Transportation Employee Testing Act of 1991, Pub. L. 102-143, Title V. The principal purpose for which the information sought is to be used is to ensure that you have submitted to breath alcohol testing and to ensure that you are promptly notified in the event of noncompliance with the U.S. Department of Transportation breath alcohol testing requirements.

Submission of your SSN is not required by law and is voluntary. If you object to the use of your SSN in this form, you will not be denied any right, benefit, or privilege provided by law; a substitute number or other identifier will be assigned.

The information provided in this form may be disclosed, as a routine use, to a Federal, State, or local agency for authorized investigative or enforcement purposes or to a court or an administrative tribunal when the Government or one of its agencies is a party to a judicial proceeding before the court or involved in administrative proceedings before the tribunal.

PAPERWORK REDUCTION ACT NOTICE (as required by 5 CFR 1320.21)

Public reporting burden for this collection of information is estimated for each respondent to average: 1 minute/employee, 4 minutes/Breath Alcohol Technician. Individuals may send comments regarding these burden estimates, or any other aspect of this collection of information, including suggestions for reducing the burden, to U.S. Department of Transportation, Drug Enforcement and Program Compliance, Room 9404, 400 Seventh St., SW, Washington, D.C. 20590 or Office of Management and Budget, Paperwork Reduction Project, Room 3001, 725 Seventeenth St., NW, Washington, D.C. 20503.

U.S. Department of Transportation (DOT) Breath Alcohol Testing Form

[THE INSTRUCTIONS FOR COMPLETING THIS FORM ARE ON THE BACK OF COPY 3]

► STEP 1: TO BE COMPLETED BY BREATH ALCOHOL TECHNICIAN

A. Employee Name _____
(PRINT) (First, M.I., Last)

B. SSN or Employee ID No. _____

C. Employer Name, _____
Address, & _____
Telephone No. _____

() _____
Telephone Number

D. Reason for Test: ☐ Pre-employment ☐ Random ☐ Reasonable Suspicion/Cause ☐ Post-accident ☐ Return to Duty ☐ Follow-up

► STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to breath alcohol testing required by U.S. Department of Transportation regulations and that the identifying information provided on this form is true and correct.

Signature of Employee

Date ____/____/____
Month Day Year

STEP 3: TO BE COMPLETED BY BREATH ALCOHOL TECHNICIAN

I certify that I have conducted breath alcohol testing on the above named individual in accordance with the procedures established in the U.S. Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing devices identified, and that the results are as recorded.

Screening test: Complete only if the testing device is not designed to print the following.

Test No.	Testing Device Name	Testing Device Serial Number	Time	Result
			AM PM	

Confirmation test: Confirmation test results MUST be affixed to the back of each copy of this form.

Remarks: _____

(PRINT) Breath Alcohol Technician's Name (First, M.I., Last)

Signature of Breath Alcohol Technician

Date ____/____/____
Month Day Year

► STEP 4: TO BE COMPLETED BY EMPLOYEE

I certify that I have submitted to breath alcohol testing and the results are as recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment if the results are 0.02 or greater.

Signature of Employee

Date ____/____/____
Month Day Year

**AFFIX SCREENING TEST RESULTS HERE
(IF APPLICABLE)**

USE TAMPER-EVIDENT TAPE

AFFIX CONFIRMATION TEST RESULTS HERE

USE TAMPER-EVIDENT TAPE

INSTRUCTIONS FOR COMPLETING THE U.S. DEPARTMENT OF TRANSPORTATION BREATH ALCOHOL TESTING FORM

NOTE: Use a ballpoint pen, press hard, and check all copies for legibility.

STEP 1 The Breath Alcohol Technician (BAT) completes the information required in this step. Be sure to print the employee's name and check the box identifying the reason for the test.

NOTE: If the employee refuses to provide SSN or I.D. number, be sure to indicate this in the remarks section in **STEP 3**. Proceed with **STEP 2**.

STEP 2 Instruct the employee to read, sign, and date the employee certification statement in **STEP 2**.

NOTE: If the employee refuses to sign the certification statement, do not proceed with the alcohol test. Contact the designated employer representative.

STEP 3 The Breath Alcohol Technician (BAT) completes the information required in this step. After conducting the alcohol screening test, do the following (as appropriate):

If the breath testing device used in conducting the screening test is not capable of printing the screening test information located on the front of this form (test number, testing device name, testing device serial number, time of test and results), complete this information in the space provided on the front of this form,

NOTE: Be sure to enter the result of the test exactly as it is indicated on the breath testing device, i.e., 0.00, 0.02, 0.04, etc.

OR, If the breath testing device used in conducting the screening test is capable of printing the screening test information located on the front of this form, affix the printed information in the space provided above. Be sure to use tamper-evident tape.

If the results of the screening test are less than 0.02, print, sign your name, and enter today's date in the space provided. Go to **STEP 4**.

If the results of the screening test are 0.02 or greater, a confirmation test must be administered in accordance with DOT regulations. An **EVIDENTIAL BREATH TESTING** device that is capable of printing confirmation test information must be used in conducting this test.

After conducting the alcohol confirmation test, affix the printed information in the space provided above. Be sure to use tamper-evident tape.

Print, sign your name, and enter the date in the space provided. Go to **STEP 4**.

STEP 4 Instruct the employee to read, sign, and date the employee certification statement in **STEP 4**.

NOTE: If the employee refuses to sign the certification statement in **STEP 4**, be sure to indicate this in the remarks section in **STEP 3**.

Retain **Copy 1** (white page) for BAT records.
Give **Copy 2** (green page) to the employee.
Forward **Copy 3** (blue page) to the employer.

PAPERWORK REDUCTION ACT NOTICE (as required by 5 CFR 1320.21)

Public reporting burden for this collection of information is estimated for each respondent to average: 1 minute/employee, 4 minutes/Breath Alcohol Technician. Individuals may send comments regarding these burden estimates, or any other aspect of this collection of information, including suggestions for reducing the burden, to U.S. Department of Transportation, Drug Enforcement and Program Compliance, Room 9404, 400 Seventh St., SW, Washington, D.C. 20590 or Office of Management and Budget, Paperwork Reduction Project, Room 3001, 725 Seventeenth St., NW, Washington, D.C. 20503.

Chapter 9.

ADMINISTRATIVE REQUIREMENTS

You must maintain certain records concerning your testing programs for specific periods of time. In addition, you must submit annual reports to FTA regarding testing program activities and results.

If you receive funding directly from FTA, you must certify annually that you are in compliance with the alcohol and drug testing regulations. If you receive FTA funding through a State agency, you do not need to certify compliance to FTA, but the State must certify on your behalf. The State has the option of requiring you to provide it certification of compliance. Sample letters of certification can be found in Chapter 2, "Regulatory Overview," in the Sample Documentation section.

Section 1. RECORDKEEPING

You must maintain records on your program administration and the test results of individuals for whom you have testing responsibility (§653.71, 654.51). Figure 9-1 summarizes your record retention requirements. You must maintain your records in a secure location with controlled access.

If you use a consortium to administer your testing program, you may arrange to have the consortium maintain some or all of your records. It is not necessary, under these circumstances, for you to maintain a duplicate set of records. However, it is your responsibility to exercise and docu-

ment oversight/compliance activities to ensure that records are accurate and current and that they fully comply with FTA regulations. Such activities should include those shown in Figure 9-2. Checklists of how long you should retain each of your records can be found in the Sample Documentation section of this chapter.

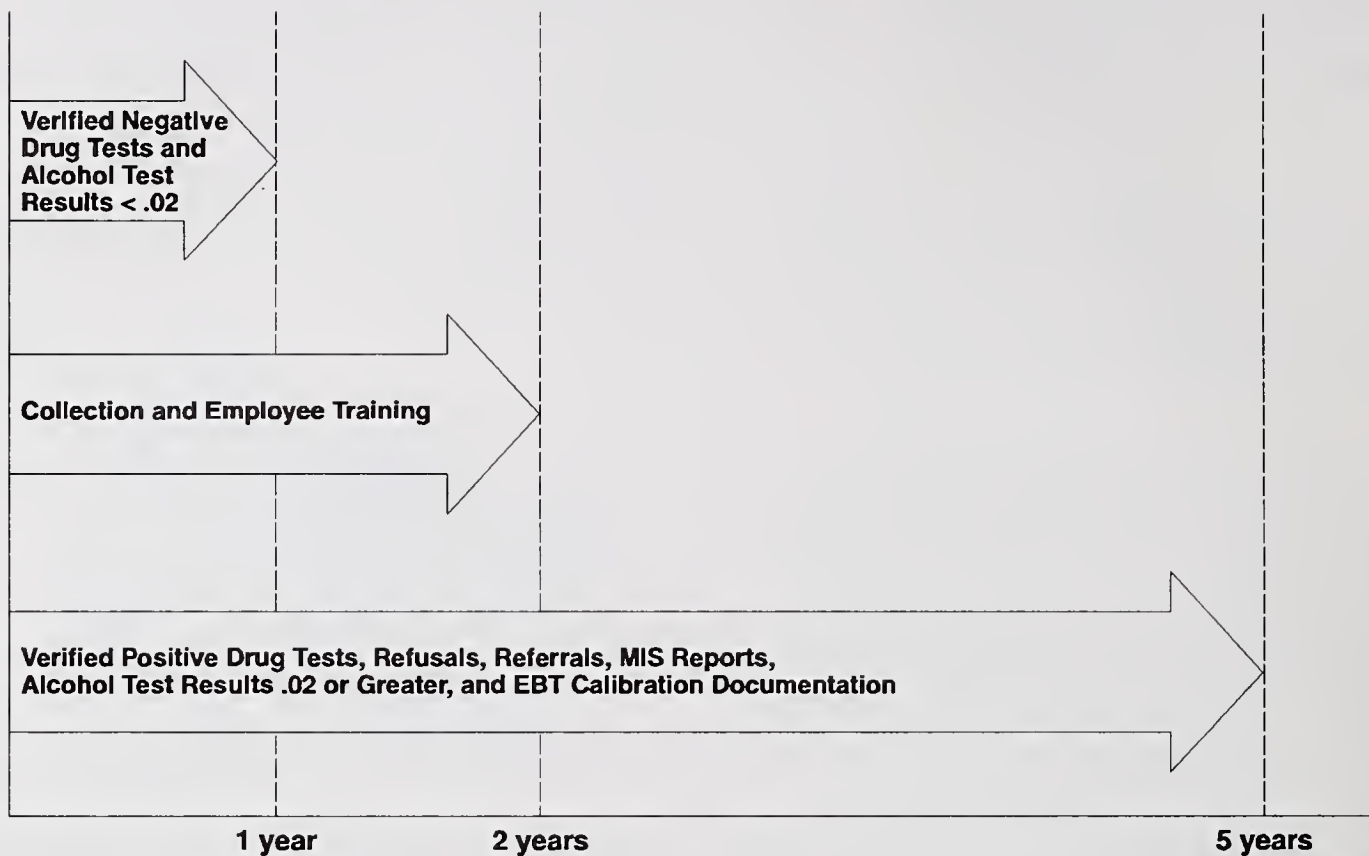


Section 2. CONFIDENTIALITY AND ACCESS TO RECORDS

The regulations (§653.75, 654.55) indicate that test results may be released only under the following circumstances:

- Employers shall release information or copies of records regarding an employee's test results to a third party only as directed by specific, written instruction of the employee.
- Employers may disclose information related to a test result to the decision maker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the employee tested.
- Upon written request, employers must promptly provide any employee with any records relating to his/her test.

Figure 9-1. Record Retention Requirements



- Employers must release information to the National Transportation Safety Board (NTSB) about any post-accident test performed for an accident under NTSB investigation.
- Employers shall make available copies of all results of employer testing programs, and any other records pertaining to testing programs when requested by DOT or any DOT agency with regulatory authority over the employer or any of its employees, or to a State oversight agency authorized to oversee rail fixed guideway systems.

Employers shall maintain records in a secure manner, so that disclosure of information to unauthorized persons does not occur.

Besides the employer, the collection site, laboratory, Medical Review Officer, and Substance Abuse Professional should also be held to strict confidentiality requirements. The testing laboratory must be prohibited from releasing individual test results to anyone except the designated MRO. The MRO and the BAT should only report individual employee's test results to your designated drug and alcohol program manager and to the individual who was tested. To ensure that confidentiality is not violated, it is your responsibility to clearly define who will receive test results and for what purposes in accordance with 49 CFR part 653.

The release of test results is only one concern. You must also be sensitive to

Figure 9-2. Examples of Consortium Monitoring/Oversight Activities Related to Recordkeeping and Reporting

- Reviewing references of organizations and bidders proposing consortium services to ensure that they are qualified to perform the service and, ideally, that they currently are performing the same or a similar service successfully.
- Maintaining a contract that requires the consortium to retain records in compliance with 49 CFR 653 and 49 CFR 654 and any amendments to those regulations or subsequent regulations regarding FTA drug and alcohol testing recordkeeping.
- Requiring the consortium to provide regular (monthly or quarterly as appropriate to your testing volume) reports of testing activity regarding your employees.
- Where you do have records related to those testing activities (e.g., regarding disciplinary or other human resources actions taken as a result of test results), comparing those records to the consortium reports to confirm the accuracy of consortium reports and following up on any discrepancies.
- Maintaining a contract that permits you to review their procedures and facilities and to review the records of your employees. Exercising this option where feasible or economically justifiable to do so.
- Maintaining a contract that requires the consortium to provide you with copies of your records upon request within five (5) working days if you require such records for USDOT or other review.

employee expectations of confidentiality in other aspects of a drug and alcohol program. For example, if it becomes widely known that an employee has been subjected to reasonable suspicion testing (even though the test results are negative), that employee may feel that his/her expectations of privacy and confidentiality have been violated. Likewise, if referrals to an EAP for rehabilitation become a topic of gossip, employees may lose faith in your program and become distrustful of, and hostile toward, management. Therefore, confidentiality should be applied to all aspects of your substance abuse management program, particularly with respect to identifying specific individuals. The general rule of thumb is to apply the same high regard for

privacy and confidentiality that you would want and expect for yourself.

Section 3. REPORTING

FTA requires that transit agencies file annual reports summarizing test results (§653.73, 654.53). It will use this information to review and revise its testing regulations, and to enforce the regulations. The standard Management Information System (MIS) reports that must be used are contained in 49 CFR parts 653 and 654. Grantees are responsible for submitting annual MIS reports to FTA on their contractors with safety-sensitive employees covered by the FTA regulations.

Best Practices

Confidentiality

A District Transportation Authority assures, as part of the District's policy, that no one in management may reveal that an employee has tested positive. Laboratory test results are returned to the MRO who is authorized to report the results only to the system's Director of Personnel. The Director of Personnel contacts only the Director of Transportation who, in turn, informs the employee that he or she is "disqualified for work due to failing a physical for drugs." Records are maintained by the MRO and the Director of Personnel only, and the number of system personnel who are aware of what is happening is minimized.

Annual reports must be submitted to the FTA Office of Safety and Security by March 15 following each calendar year (January 1 through December 31). States must collect the MIS forms from their sub-recipients and contractors and forward those forms to FTA by March 15.

If your transit system is a member of a testing consortium, that consortium must report your results to you. You may either compile your annual report from monthly or quarterly reports provided by the consortium, or you may require the consortium to prepare the annual report. You must reserve adequate time to review the data provided by the consortium and submit your report by March 15. Even if the consortium maintains your records and prepares your reports, you are responsible for their accuracy and timely submission.

Section 4. CERTIFICATIONS

Each year you must certify to your FTA Regional Office that your transit system or State, as appropriate, is in compliance with the drug and alcohol testing rules. You must certify using the language similar to that contained in the regulations (§653.83, 654.83). Sample certification letters that meet this requirement appear in the Sample Documentation section of Chapter 2, "Regulatory Overview."

You must submit your first certification by January 1, 1995, for large operators, and by January 1, 1996, for small operators and States.

Your certification must be authorized by your governing board, if you have one, or other authorized official. You should maintain a record indicating an appropriate level of review of the program and the certification prior to signing. Figure 9-3 describes individuals who might be given authority to certify compliance at various types of organizations. It also lists the records that should be maintained to demonstrate proper granting of authority and review.

If you are a State, you must certify the compliance of transit agencies that you oversee. Simply requiring transit agencies to certify that they are in compliance may not be adequate. Examples of oversight activities you should consider implementing include

- Technical assistance and training to establish and operate programs

Figure 9-3. Examples of Individuals Given Authority to Certify Compliance

A. At a Nonprofit Agency or Independent Transit Authority

Individual Authorized to Certify Compliance	Typically Authorized By	Records That Should Be Maintained to Demonstrate Proper Granting of Authority and Review
Program Manager	General Manager Executive Director Board of Directors	Board Minutes Authorizing Memorandum
General Manager Executive Director	Board of Directors	Board Minutes
Board President Board Chairman	Board of Directors	Board Minutes

B. At a Municipal Agency

Individual Authorized to Certify Compliance	Typically Authorized By	Records That Should Be Maintained to Demonstrate Proper Granting of Authority and Review
Program Manager	Department Head; Municipal CEO; Municipal Council, Board; or Equivalent	Authorizing Memorandum Minutes
Department Head	Mayor; Agency Head; Municipal Council	Authorizing Memorandum Minutes
City Manager; Head of Municipal Council; or Equivalent	Mayor; Municipal Council	Minutes

C. At a State Agency

Individual Authorized to Certify Compliance	Typically Authorized By	Records That Should Be Maintained to Demonstrate Proper Granting of Authority and Review
Section 18 Program Manager or Other DOT Employee with Responsibility for Alcohol Misuse and Drug Use Programs	Head of Public Transportation Division	Authorizing Memorandum, Initialed Copy of Report
Head of Public Transportation Division	Secretary or Commissioner of Transportation	Authorizing Memorandum
Secretary or Commissioner of Transportation	Follow State Convention	Follow State Convention

- On-site monitoring and inspection
- Regular reporting and follow-up.

If you receive your funding directly from FTA, you must certify compliance with the Drug-Free Workplace Act, as well as with the FTA's drug and alcohol testing regulations. A copy of the required Drug-Free Workplace Act certification is included in Chapter 13, "The Drug-Free Workplace Act of 1988." The certification is normally submitted to your regional FTA office at the same time as, and as a part of, your grant application. See Chapter 13 for a detailed discussion of the Drug-Free Workplace Act.

Section 5. SANCTIONS

If you do not institute a program including all of the elements required by the applicable regulations, your agency can lose its FTA funding.

You should be very careful in preparing both your reports and your certifications. Neither should be prepared or signed casually. It is especially important to ensure that your governing board or senior officials who will sign (or authorize you to sign) annual reports and certifications are fully informed on a regular basis about the status and the activities of the program.

Your signature on the annual reports and certifications indicates that their contents are true and accurate to the best of your knowledge. If you knowingly and willfully make or cause others to make false statements or representations in either the annual reports or the certifications, you are committing a Federal crime and are subject to criminal penalties including a fine of up to \$10,000 or imprisonment for not more than 5 years, or both (§1001 of title 18 of the U.S. Code).

Sample Documentation

Record Retention Checklists

Alcohol Program Records You Must Maintain for 1 Year

1. Records of Test Results less than 0.02

_____ Employer's copy of the alcohol test form, including results of the test.

Alcohol Program Records You Must Maintain for 2 Years

1. Records Related to the Collection Process *Except* Calibration of Evidentiary Breath Testing Devices

_____ Collection logbooks, if used.

_____ Documents relating to the random selection process.

_____ Verification of Breath Alcohol Technician training.

_____ Documents generated in connection with decisions to administer reasonable suspicion alcohol tests.

_____ Documents generated in connection with decisions on post-accident tests.

_____ Documents showing existence of medical explanation of inability of safety-sensitive employee to provide enough breath for test.

2. Education and Training Records

_____ Materials on alcohol misuse awareness, including a copy of the employer's policy on alcohol misuse.

_____ Documentation of compliance with requirements of 49 CFR 654.81.

_____ Educational materials that explain the regulatory requirements.

_____ The employer's policy and procedures with respect to implementing the regulatory requirements.

- _____ Written notice to every safety-sensitive employee of the availability of the above materials.
- _____ Written notice to all safety-sensitive employee organizations (i.e., collective bargaining units) of availability of above materials.

Alcohol Program Records You Must Maintain for 5 Years

1. Alcohol Test Records with Alcohol Readings of 0.02 or Greater

- _____ The employer's copy of the alcohol test form, including the results of the test.
- _____ Documents related to the refusal of any safety-sensitive employee to submit to an alcohol test required by 49 CFR 654.
- _____ Documents presented by a covered employee to dispute the result of an alcohol test administered under 49 CFR 654.

2. Calibration Documentation

- _____ Documents specifying the machine calibrated (e.g., by serial number), the date of calibration, the certified technician calibrating the equipment, and the results of the calibration. Signed by the calibrating technician.
- _____ Manufacturer's calibration schedule for the model of equipment used.
- _____ Certification record for the calibrating technician.

3. Employee Evaluation and Referrals

- _____ Records pertaining to a determination by a substance abuse professional concerning a safety-sensitive employee's need for assistance.
- _____ Records concerning a safety-sensitive employee's compliance with the recommendations of the substance abuse professional.

4. Annual MIS Reports

Drug Program Records You Must Maintain for 1 Year

1. Records of Verified Negative Drug Test Results

- _____ Employer's copy of custody and control form.

Drug Program Records You Must Maintain for 2 Years

1. Records Related to the Collection Process

- _____ Collection logbooks, if used.
- _____ Documents relating to the random selection process.
- _____ Documents generated in connection with decisions to administer reasonable suspicion drug tests.
- _____ Documents generated in connection with decisions on post-accident testing.
- _____ MRO documents showing existence of medical explanation of inability of safety-sensitive employee to provide enough urine.

2. Education and Training Records

- _____ Training materials on drug use awareness, including a copy of the employer's policy on prohibited drug use.
- _____ Names of safety-sensitive employees attending training on prohibited drug use and the dates and times of such training.
- _____ Documentation of training provided to supervisors to qualify them to make reasonable suspicion determinations.
- _____ Certification that training complies with the regulatory requirements.
- _____ Procedures to assess those with verified positive tests, providing available services, referral, suspension, and dismissal.

Drug Program Records You Must Maintain for 5 Years

1. Records of Covered Employee Verified Positive Drug Test Results

- _____ Employer's copy of the chain-of-custody form.
- _____ Documents related to the refusal of any safety-sensitive employee to submit to a required drug test.
- _____ Documents presented by a safety-sensitive employee to dispute the result of a drug test administered under 49 CFR part 653.

2. Covered Employee Referrals to Substance Abuse Professional and Return to Duty and Follow-up

_____ Records pertaining to a determination by a substance abuse professional concerning a safety-sensitive employee's suitability to return to work as a safety-sensitive employee.

_____ Records concerning a safety-sensitive employee's entry into and completion of the program of rehabilitation recommended by the substance abuse professional.

3. Annual MIS Reports





Chapter 10.

EMPLOYEE ASSISTANCE PROGRAMS, REHABILITATION, AND TREATMENT

Under the provisions of both FTA drug and alcohol regulations, you are required to have a Substance Abuse Professional (SAP) evaluate any safety-sensitive employee who has used prohibited drugs or misused alcohol regardless of the consequences specified in your policy. You must also inform the employee of resources available to resolve problems associated with substance abuse (§653.37, 654.75). You do not have to provide these services to applicants who fail pre-employment tests. You must provide these services to your employees even if your policy is to

terminate employees who violate the drug and alcohol regulations.

You are not required to provide, or to pay for, rehabilitation and treatment programs. However, many transit agencies choose to do so because research and experience have demonstrated that such programs can be highly cost effective. Programs that address substance abuse problems in the workplace are often referred to as "Employee Assistance Programs" or "EAPs." Many EAPs address employee family problems as well as substance abuse.

In addition, because the regulations require you to provide certain functions that are often performed by EAPs (for example, assessment, confidential record-keeping, determination of suitability to return to work, and recommendation for follow-up testing), the additional costs to expand an existing EAP to include

substance abuse treatment are lower than the initial costs to start a new EAP.

For these reasons, transit agencies that currently do not have EAPs should carefully consider the economic and other benefits of establishing EAPs when implementing their drug and alcohol testing programs. Transit agencies that already offer EAPs should review them for opportunities to integrate their FTA-mandated testing programs. You should take pains to ensure, however, that the testing programs do not compromise, or appear to the employees to compromise, the integrity of the EAP.

Section 1. EMPLOYEE ASSISTANCE PROGRAMS

EAPs help employees and family members with personal and behavioral problems including but not limited to health, marital, financial, alcohol, drug, legal, emotional, stress, and other concerns that may adversely affect job performance, productivity, and, most importantly in the transit industry, safety.

EAP services may be provided directly by the transit system or union, or the service may be contracted out. Generally speaking, companies with fewer than 3,000 employees will find it more cost effective to contract out for services. However, regardless of the number of employees, it is still often more cost effective to contract out services especially if workers are geographically dispersed or if the EAP is intended to be "full service" and to cover a broad range of problems.

Internal EAPs (those operated directly by the transit agency) are typically established within human resources or medical departments. Although the company operates the EAP, the EAP facility may or may not be on the transit agency's property.

External EAPs are contracted services provided for the transit system or union by an outside vendor. Vendors may be large national or international EAP providers, local specialized EAP providers, or university-based or other mental health clinics. As with the internal EAPs, physical facilities may or may not be located on the transit system's property.

Finally, just as with testing programs, EAPs may be cost effectively developed through consortia (see Chapter 11, "Joining a Consortium"). Small systems or unions join together to combine their resources and achieve purchasing power and operational expertise typically unavailable to any one consortium member acting individually. For example, a 10-employee transit system that could not afford to purchase external EAP services on its own could join a consortium with other similar transit agencies and achieve more favorable financial terms.

The specific services your EAP will provide are a matter of program design. You can choose to include any services you believe will improve the productivity and safety of your work force. Figure 10-1 is reproduced from the FTA publication, *Employee Assistance Program for Transit Systems*, and identifies the features that full function EAPs should provide whether they

Figure 10-1. Important Features to Include in EAPs

Features	Comprehensive Option
Program Development	<ul style="list-style-type: none"> – Needs Assessment – Program Design – Policies and Procedures Development – Union Integration – Start-Up Meetings with Key Personnel and Advisory Committee
EAP Promotion	<ul style="list-style-type: none"> – Annual Face-to-Face Employee Orientations (or Video) – Wellness Seminars – Posters – Paycheck Stuffers and Wallet Cards – Personalized EAP Brochure
Clinical Services* <i>*includes immediate family</i>	<ul style="list-style-type: none"> – Face-to-Face Assessment, Counseling, and Referral Services – 24-Hour Response – Appointments Within 48 Hours – Telephone and Face-to-Face Follow-Up for a Minimum of 3 Months until Problem Resolution
Supervisor and Manager Training	<ul style="list-style-type: none"> – Training Programs (2-1/2 Hours Each) – Periodic Updates for New Managers and Supervisors – Supervisor's Guide
Consultation	<ul style="list-style-type: none"> – Consultation with Key Managers as Needed – Unlimited Telephone Consultation and Assistance to Individual Supervisors as Needed
Reports and Evaluation	<ul style="list-style-type: none"> – Quarterly Reports Analyzing Performance (Statistical Summaries and Narrative Reports with Recommendations) – Semi-Annual Presentations to Senior Management
Fee Options Available	<ul style="list-style-type: none"> – Per Capita Fee – Sliding Scale Based on Utilization – Administrative Fee/Per Case Basis
Other Services and Features Available	<ul style="list-style-type: none"> – Critical Incident Response – Executive Assistance Program – Drug-Free Workplace Training and Consultation – Workplace Seminar Series

Because every company's needs are unique, each Employee Assistance Program option allows for complete flexibility in program design and delivery. Each option is also structured to be easily integrated with other existing benefits programs.

are internally, externally, or consortium operated.

In addition, some specific requirements of the new testing regulations lend themselves to being performed by EAPs. Examples of these requirements are listed in Figure 10-2.

Figure 10-2. Examples of Potential EAP Activities

- Maintenance of confidential program records
- Program reporting
- Testing (particularly return to duty and follow-up)
- Supervisory and employee training on requirements of alcohol and drug testing regulations

Providing an EAP. As mentioned above, the testing regulations do not require you to provide treatment or rehabilitation for your employees. Nonetheless, many employers in a variety of industries, with and without testing programs, have discovered the value of providing employee assistance services for their employees and their employees' immediate families.

According to the U.S. Department of Labor, corporations are increasingly turning to EAPs to deal with their employees' substance abuse problems. Over 10,000 EAPs operate across the country.

All sizes and types of employers have instituted EAPs because an EAP can help save money through decreased absenteeism; fewer accidents; reduced use of medi-

cal and insurance benefits; savings in worker's compensation claims; fewer grievances, arbitrations; and reduced employee replacement costs. A Department of Labor review of EAP cost studies revealed that for every dollar invested in EAPs, companies save between \$5 and \$16.

Major Decisions to be Made in Establishing an EAP. The decisions you must make in establishing an Employee Assistance Program fall into three broad categories:

1. Program Scope

- Employee eligibility (e.g., all employees, safety-sensitive employees only, probationary employees, immediate family members, significant others)
- Number of work sites to be served
- Location of company work sites
- Types of problems to be addressed (e.g., substance abuse, legal, financial, marital, psychological)

2. Program Type

- Internal—in-house EAP
- External—purchase services of external company
- Consortium—combine with other transit agencies to purchase services

3. Program Administration

- EAP interface with other departments and programs (e.g., personnel, benefits, unions, training and development, drug and alcohol testing, progressive discipline)
- Resources, facilities, and staffing
- Program launching and promotion
- Education, training, and consulting
- Program accountability (statistical reporting, records, program evaluation).

Steps in Establishing an EAP. The steps you will follow closely parallel those you have followed in establishing your substance abuse management program, so much of the work may have already been accomplished. At the very least, you will have procedures and processes in place that can guide your EAP development.

While there are many ways to go about EAP development, the following steps have proved useful for many organizations including transit agencies:

1. Create a program advisory committee.
2. Conduct a needs assessment.
3. Select a provider.
4. Determine cost.

5. Determine what needs to be done after an EAP service provider is in place.

6. Determine additional resources available.

Create a Program Advisory Committee.

You may have established such a committee or task team to implement your drug and alcohol program. The program advisory committee involves many components of the transit system in the design and implementation of the EAP. This can be critical later in promoting the acceptability and use of the program.

Typically, a program advisory committee will include representatives of both labor and management. It will also cut across transit system divisions and departments. The general rule you should follow in selecting participants is that, if their support will be important in implementing or operating the program, they should be included. Obvious departments to include are human resources, medical, labor relations, legal, and security, as well as more broad representation from operating and maintenance departments. Because of the importance of the interface between your drug and alcohol testing programs and the EAP, whoever manages those programs should be on the advisory committee. However, to the extent that your EAP will provide the more “broad brush” services typical of an EAP, and will not simply be a substance abuse arm of the testing program, the manager of the testing program should *not* be the chair of the program advisory committee or the coordinator of the EAP.

The responsibilities of the program advisory committee will be to develop, implement, and oversee the EAP; and therefore, although it will be the primary force moving the creation of the EAP, its responsibilities will not end once the EAP has begun operating.

The program advisory committee will develop the EAP policy (which may require negotiation between management and bargaining units) and ensure that the policy and the program are properly integrated with other policies and operations of the transit system.

To meet their responsibilities in these areas, the program advisory committee may turn to outside resources including

- The more than 120 transit systems that provide EAPs for their employees. (FTA's *Employee Assistance Program for Transit Systems* provides a list of transit systems with EAPs and each system's contact person for the program.)
- Independent personnel and employee benefits consultants.
- EAP professionals including local and national employee assistance professional associations.

Conduct a Needs Assessment. The needs assessment is used to help you determine the scope of services the program should offer and other elements of program design. It can be useful in identifying characteristics of the work environment that are affecting employee performance, as well as in predicting utilization levels for

various EAP services. This last information can be particularly valuable since it will help you staff the EAP appropriately and budget accurately. It can also suggest the most advantageous fee structure in any contract to be negotiated with an external EAP service provider.

You may also choose to conduct a needs assessment on an annual or biennial basis as a part of an organized evaluation and planning tool for assessing and improving EAP performance.

Select a Provider. If you choose to operate a program internally, once you have your needs assessment in hand, you are ready to begin identifying staff and establishing the program.

Most transit agencies will choose to contract for external EAP services either individually or as members of a consortium.

If you have determined that a consortium is the best approach for you, you will need to identify potential consortium partners. Local associations of EAP professionals, Chambers of Commerce, other business groups, and your State transit association may be helpful. However you identify your partners, you must work with them on a Program Advisory Committee so that the EAP consortium is responsive to all members' needs. While, as with all committees, this may result in a better program than you might have designed individually, you may also need to compromise on design issues that you would not

include if you were running your own program.

You will need to prepare and release a request for proposal (RFP) to obtain EAP services. Because of the wide variety of types of EAP services and the different interpretations of common terms, your RFP should be very specific as to the services you want to purchase and how you expect the bidders to prepare their responses. This specificity will help make sure that you are purchasing the services you expect and that proposals from different vendors are comparable. Just as importantly, it will serve as the basis for a very specific contract that you will negotiate with the service provider.

The Sample Documentation section contains a comprehensive sample RFP for purchasing EAP services. You should review it to determine the extent to which it meets your program design needs. Additional sample RFPs may be found in the FTA's *Employee Assistance Program for Transit Systems* manual.

Send the RFP to EAP providers who serve your area. You will be able to generate names by talking to other employers in the area, by consulting your local employee assistance professionals association, or by looking in your yellow pages directory under a heading such as "Employee Counseling Services." You can obtain a national directory of EAP service providers by contacting the Employee Assistance Professionals Association, Inc., whose address and telephone number are provided in Figure 10-3.

Be sure to allow bidders adequate time to provide the detailed information you have requested in the format you have requested. Make the results of your needs assessment available to those who request it. If your agency's purchasing procedures permit, meet with vendors who request meetings. EAPs are very "people-oriented" activities, and you should take the opportunity to get to know the people who want to provide this service for your work force. You must be comfortable with them. You are, after all, turning over the care and well-being of your most valuable asset to them.

The draft RFP in the Sample Documentation section illustrates the selection criteria you will want to employ in choosing among bidders. Those criteria include, for example

- Services offered
 - assessment
 - short-term counseling
 - referrals
 - follow-up
 - referral source maintenance
- Case management procedures
- Clinical supervision procedures
- Reporting
- Managerial and supervisory training
- Management consultation
- Employee education and program announcement
- Staff qualifications

Figure 10-3. Additional Sources of Information to Help You Establish an Employee Assistance Program

1. *Employee Assistance Program for Transit Systems: EAP—A Procedural Guide and Model Program*. Manual published by UMTA (FTA) September 1991.
2. Employee Assistance Professionals Association, Inc. (EAPA), 2101 Wilson Blvd., Suite 500, Arlington, VA 22207; (703) 522-6272. This is the professional association of those who work in employee assistance programming. It establishes standards for EAPs, certifies practitioners, hosts professional development activities including an annual meeting, and publishes materials to assist you in starting and operating a program. Its public information component will provide you with background information. Some publications likely to be of particular interest to transit systems are listed separately below.
3. *Legal Issues in EAP Practice*. Published by EAPA (see above). Addresses critical legal issues in EAP practice including confidentiality, drug testing, Americans with Disabilities Act, and Employee Retirement Income Security Act (ERISA) (\$30 members/\$40 nonmembers).
4. *Starter Kit*. Published by EAPA (see above). A set of 5 publications to assist in creating an EAP from scratch or improving existing programs. The five publications (any of which may also be ordered separately) include: *Standards for Employee Assistance Programs, A Guide for Supervisors, EAP Theory and Operations, The Continuum of Services, and EAP Value and Impact* (\$40 members/\$60 nonmembers).
5. *Standards for Employee Assistance Programs: Professional Guidelines*. Published by EAPA (see above). While this is available as a part of the starter kit, those who do not wish to buy the entire starter kit should still consider purchasing this book, which includes standards, practical guidelines, and complete sets of sample forms to adapt for use in your program (\$20 members/\$30 nonmembers).
6. *What Works: Workplaces Without Alcohol and Other Drugs*. U.S. Department of Labor, October 1991. Contains descriptions of many industry EAP programs and sample policies that may serve as models for your program. (No charge.)
7. *Residential School in Management and Clinical Aspects of Employee Assistance Programs*. Sponsored by the University of Maryland College of Business and Management and the School of Social Work. Intensive 5-day program designed to teach everything you would need to establish and operate a successful EAP. Offered every April. (301) 405-2155.

- | | |
|--|---|
| • Proposed office space, facilities and hours of operation | • Understanding of your transit system, work force, and needs |
| • Proposed methods for evaluating EAP performance | • Confidentiality and recordkeeping procedures |
| • Organizational experience | • Participation rates (historical and anticipated/guaranteed) |

- Financial capability
- Understanding of multiculturalism, multilingual forces
- Price.

In the end, your best indication of how good a particular vendor will be might be determined best through interviews of other companies for whom the vendor provides services. Once you have narrowed your search to two or three finalists who seem to meet your criteria, call several clients of each and ask detailed questions about the vendor's services. It is more important to call companies located in your community who know the potential vendor than it is to call other transit agencies.

Determine Cost. Depending upon the size of your work force, its location, types of programs available, number of problems in your work force, who you cover, and many other factors, the cost may vary significantly. This is true whether your program is internal or external. The more responsibilities the EAP has, the more it will cost. Internally, these costs are borne through the salaries and administrative costs of the program. Externally, they are recovered through the vendor's pricing structure.

The pricing structure may vary. You may have the option of paying on a *per capita* basis where you pay a set amount per year for each employee whether or not each employee uses the program, or you may pay on a fee-for-service basis where you pay only when an employee actually sees a counselor.

Actual pricing may vary from \$10 to \$110 per employee annually. In all but unusual circumstances, you can probably obtain comprehensive services at no more than \$50 per employee per year.

Determine What Needs to be Done After an EAP Service Provider is in Place. Regardless of whether you have an internal, external, or consortium EAP, someone must be in charge. We refer to that person as the EAP Coordinator although, in fact, the person may have a different title in your company (e.g., Nurse, Human Resources Specialist, Deputy General Manager). Typically, this person will be the same one who coordinated the planning for the EAP with the program advisory committee.

The responsibilities of the EAP Coordinator include

- Coordinating program advisory committee meetings
- Overseeing implementation of the EAP
- Scheduling senior management briefings
- Planning and coordinating EAP activities (i.e., training, employee orientation sessions, news articles)
- Overseeing EAP promotional activities
- Negotiating the EAP contract (usually annually)
- Monitoring the effectiveness of the EAP

- Monitoring the EAP provider's performance.

Determine Additional Resources Available. Implementation of the Employee Assistance Program is a time-consuming process that should not be rushed. If you do not have a program now and wish to consider incorporating one as a rehabilitation component to your drug and alcohol program, begin right away! EAPs that succeed have been carefully planned and developed with the support and cooperation of many levels of management and union participation as well.

In addition, many companies, including transit agencies, have implemented EAPs before you. Take advantage of their experience. As discussed above, consultants are available to help you establish a program, but a great deal of free and nearly free information is also available. Figure 10-3 lists some of the resources you should consult if you are considering establishing an EAP. The most essential of these is the FTA procedural guide.

Section 2. DRUG AND ALCOHOL REHABILITATION AND TREATMENT

As noted earlier, the FTA regulations do not require you to provide, or pay for, rehabilitation and treatment programs. However, rehabilitation and treatment programs are often an integral part of successful substance abuse programs. The decision to provide rehabilitation to affected employees should be made with both the employer and employee's needs in mind.

Two basic types of treatment are available that include various inpatient and outpatient services. The inpatient mode often involves a 1- to 4-week stay in the hospital or residential treatment center and may be targeted toward the more severely addicted person. The outpatient mode is appropriate to those persons who are employed and can benefit from education and behavior modification to remain drug- and/or alcohol-free. Outpatient treatment is the predominate mode in the transit industry; 75 percent of persons receiving treatment for drug addiction and/or alcoholism are treated as outpatients.

Intensive Inpatient Services. Inpatient centers treat dependent people with physical and/or psychological complications. Patients in intensive treatment may need supervised detoxification and may suffer physical withdrawal symptoms. As part of treatment, patients will attend education and awareness lectures and group therapy sessions. Frequently, family members are involved in treatment since dependency affects the entire family. Residential intensive inpatient treatment may last from 1 to 4 weeks.

Intensive Outpatient Services. These services treat dependent patients who have fewer physical or psychological complications. They offer effective and less expensive alternatives to residential care for individuals with relatively stable home environments and supportive employers. The patient receives education, group therapy, and individual counseling for up to 10 weeks, with most sessions scheduled in the evenings (generally three sessions per

Best Practices

EAP

One of the best examples of an employee assistance program is a union assistance program that is voluntary and available to all union members. Members may refer themselves to the program if they feel that they or a family member may have a problem, or their shop stewards may refer them. The program is located off-premises, and strict confidentiality is maintained. Professional staff are largely recruited from the rank and file and undergo thorough training and continuing professional development to become employee assistance counselors. In addition, professionals conduct a vigorous outreach program to educate the work force at the work site regarding substance abuse, the company policy, wellness, and the availability and services of the assistance program. The program itself undergoes an ongoing thorough external evaluation. The evaluator maintains the confidence of, and provides technical assistance to, the program counselors, reporting only broad assurances and concerns to management.

week). These programs often require some family involvement. Costs are generally one-third to one-half of intensive inpatient treatment.

Outpatient Follow-Up Services.

Patients discharged from intensive treatment need further help. This may be an outpatient follow-up program lasting several months to a year or more. One visit per week is typical. Many inpatient and intensive outpatient treatment plans include weekly follow-up sessions at no additional cost.

Usually your employee assistance counselor develops a treatment program that best meets the needs of the employee in a cost-effective manner. If, however, you must participate in making a treatment referral, the following guidelines will assist in evaluating the treatment program's effectiveness.

- **Cost.** High cost does not guarantee effectiveness. Conduct a cost comparison of programs. It could be, for example, that cost disparities are in the number of professionals per bed, total hours of one-on-one counseling and group therapy, number of days of treatment, amount of aftercare counseling, or extent of other medical resources utilized.
- **Reputation.** Ask other substance abuse professionals and former program participants for their candid opinions.
- **Staff qualifications.** A quality program should have a balance of professionals. Intensive inpatient programs should be staffed by nurses, physicians, psychologists, social workers, and formerly dependent counselors. There should be medical management of detoxification. Intensive outpatient programs should be staffed by a mix of psychologists, social workers, and formerly dependent counselors. In both cases, all professional staff should be State-certified treatment specialists or counselors interning for certification.
- **"Whole person" approach.** Chemical dependency is caused by many factors—childhood development, psychological instability, heredity, social environment, and lifestyle

behaviors. A quality program should meet all needs—physical (diet and exercise), social (communication skills), psychological (individual and group counseling), intellectual (education and awareness sessions), and spiritual.

Although an EAP is not required under the FTA regulations, a policy decision to attempt to reclaim human resources should be carefully considered. At first glance, it

may seem inappropriate to allow anyone to work again who has demonstrated a high-risk behavior such as drug or alcohol abuse. However, trained, skilled labor is a valuable resource, which demographic studies indicate may become increasingly difficult to obtain and retain. You should consider employee replacement costs, as well as the impacts on work productivity and morale, as you evaluate the cost effectiveness of EAP rehabilitation services.

Sample Documentation

SAMPLE
REQUEST FOR PROPOSAL
for
EMPLOYEE ASSISTANCE PROGRAM SERVICES

Purpose: To Provide Employee Assistance Program (EAP) Services to Company Employees.

Closing Date:

Place Due:

For Further Information Contact:

I. Purpose of Request for Proposal

The purpose of this Request for Proposal (RFP) is to solicit proposals to provide EAP technical and professional services for the Company.

II. Description of the Project

The Company, with an average population of (#) regular employees, is seeking to provide professional and confidential counseling and referral service to those employees experiencing personal problems. The Company is requesting a comprehensive, broad brush approach in the provision of diagnostic, treatment, referral, and follow-up activities to employees. Included in the program service is the basic training of company managers and supervisors in the purposes and uses of EAP.

III. Scope of Services

Provide EAP services including, but not necessarily limited to, the following:

- A. Provide confidential, professional, and comprehensive diagnostic, counseling, and referral services to any employee experiencing personal problems. The first session should be initially offered within a reasonable time frame from employee contact.
- B. Program administration, record keeping, and reporting. Assignment of staff to administratively service the Company's EAP, maintain complete and confidential records and report quarterly to the Company on various program and utilization statistics.
- C. Implement annual supervisory training sessions to Company supervisors in the function and uses of an EAP.
- D. Communication and consultation with EAP staff by Company supervisors around non-confidential issues, should the need arise.

- E. Periodic development and provision of EAP informational materials to the Company work force.
- F. Provision of office space to provide necessary services.

IV. General Instructions

A. Proposal Content

Proposals must set forth full, accurate, and complete information as required by the RFP, and should:

1. Describe how the respondent will deal with each item outlined in the section of this RFP headed "Scope of Services." This applies even if it is the intent of the respondent to eliminate the item or to substitute some other activity in its place.
2. Set forth an implementation plan specifying the staff credentials, capabilities, tasks to be performed, and relevant timetables for service.
3. Provide budget breakdown and fee schedule.
4. Provide original and five copies of proposal.
5. Provide reference list and permission statement allowing the Company to contact references as needed.
6. At the option of the respondent, include examples of no more than two relevant or similar projects provided by the respondent. It is highly desirable that, if such material is submitted, it be in the form of a brief summary which includes a description of the customer, description of services provided by respondent, description of the methodology employed, and examples of reporting forms used.

V. Criteria for Evaluating the Proposals Received

Proposals will be evaluated by an Advisory Review Committee composed of management and employees of the Company. The prospective contractor will be selected principally on the following criteria, though not necessarily in this order of ranking:

- A. Offeror's proposed statement of work. Emphasis will be on soundness of approach, service provisions, previous experiences, and the quality of recommendations in meeting the Scope of Services.
- B. Capability for establishing working relationships. The personnel of this project must be able to work effectively with the management of the Company. Documentation of such previously successful relationships is preferred. Interviews with prospective contractors within competitive range may be conducted to provide input for this criterion.
- C. Background and previous experience of agency/personnel (including consultant and subcontractors) to be assigned to provide EAP services and their demonstrative competence in the type of work to be performed (include a complete résumé and time commitment for professional persons to be assigned).

D. Budget and fees.

E. Organization and management. Consideration will be given to administrative, management, and program controls, and the ability to commit staff and relevant resources to an EAP.

F. Ability to satisfy minimum indemnification and insurance requirements as detailed under Section IX herein.

VI. Contract Requirements

A formal contract arrangement will be entered into with the EAP provider selected and the Company. The providers considered will be selected from responses to this RFP.

Time period of contract shall cover one year.

VII. Compliance with Federal and State Laws

The provider shall comply with all applicable Federal and State laws, rules, and regulations, and will not discriminate or permit discrimination against any person or group of persons on the grounds of sex, race, color, age, religion, or national origin in any manner prohibited by law.

VIII. Acceptance Period

In submitting a proposal, RFP respondents agree that the proposal remain valid for a period of 60 days after the closing date for submission of proposal and may be extended beyond that time by material agreement.

IX. Indemnification and Insurance Requirements

A. **Indemnification**—The EAP provider agrees to defend, indemnify, and hold harmless the Company, and its employees from any claims, liabilities and obligations, and cause of action of whatsoever kind and nature for injury to or death, including employees of the provider, or any person and for damages to or destruction of property, or loss of use, including property of the Company, resulting in connection with services performed under this agreement regardless of cause except that provider shall not be required to assume responsibility or indemnify the Company for such injuries, damages, or claims deemed by law to be due to the sole negligence of the Company, or its employees.

B. **Insurance Requirements**—The EAP provider agrees to procure and maintain in effect for the duration of this agreement the following insurance coverage with insurers licensed or approved to conduct business in the State and holding a current financial rating satisfactory to the Company.

1. **Professional Legal Liability**—Insuring against claims on suits brought by employees alleging injuries or damages, including claims brought directly by the Company, due to errors and omissions and deemed to have arisen out of work or services performed under this agreement. Coverage shall be broad enough to include:

- a. Contractual Liability
- b. Contingent Liability

Claims Made Policy— Shall provide for not less than 12-month discovery period or agreement that coverage will be renewed for a period of not less than 1 year, such completion of work or services under this agreement. In the event the Company requires coverage beyond such extension, it will retain the right to implement such requirement prior to expiration of existing coverage as specified above.

2. **Commercial General Liability**— Insurance against claims or suits brought by employees alleging bodily injury or damages of property and claimed to have arisen out of services provided under this agreement. Coverage shall be broad enough to include:

- a. Premises and Operations
- b. Contingent Liability
- c. Contractual Liability

Limits of Liability— Shall not be less than \$1,000,000 for coverage under 1 and 2 above.

Additional Named Insured— Naming the Company as an additional insured.

Knowledge of Occurrence— Standard Wording

Notice of Occurrence— Standard Wording

3. **Workers Compensation and Employers Liability**— Insuring in accordance with statutory requirements in order to meet obligations toward employees in the event of injury or death sustained in the course of employment. Employers Liability (Coverage B) shall not be less than \$100,000 each claim.

Policies under 1, 2, and 3 shall be endorsed to include the following:

Notice of Cancellation— In the event of nonrenewal or cancellation, provider's insurance shall give written notice to the company indicating that such cancellation or nonrenewal shall not be effective in less than 60 days from date notice is received by registered mail.

Certificate of Insurance— Prior to start of work or operations under this agreement or contract, a properly authorized certificate of insurance evidencing that the above described coverage is in effect including the required minimum notice of cancellation with elimination of the verbiage "will endeavor." Further, *prior to acceptance*, the certificate shall *clearly* show:

- a. Description of operations of EAP technical and professional services
- b. Location to be citywide
- c. The Company is included as an additional insured.



Chapter 11. JOINING A CONSORTIUM

Implementing your drug and alcohol program is a significant undertaking. It will involve planning, contracting, administrative, legal, and monitoring efforts, which even some large transit agencies may find among the most complex and demanding elements of their safety programs. Small transit agencies may be more seriously challenged.

One method of reducing these challenges and their associated costs, which has been tried successfully both by transit agencies and other transportation employers, is the formation of consortia for testing and related services. Consortia are defined by the FTA regulations as entities, including groups or associations of employers, that provide testing services required by the regulations and that act on behalf of the employers. FTA encourages transit agencies to form or join consortia when those agencies determine that it is in their best interests to do so.

Advantages of Consortia

Transit agencies and other employers that form or join consortia generally do so for one or more of the following reasons:

- Lower costs
- Greater expertise
- Reduced administrative burden
- Pragmatism
- Reduced liability.

Lower Costs. Because of their overhead costs (e.g., training, recordkeeping, reporting, billing, and other administrative activities), drug testing laboratories, MROs, and EAPs incur smaller per unit costs when they contract with large employers than when they contract with individual small ones. Consequently, in some cases, a small employer may not be able to buy some services. A contract that will result in fewer than ten tests per year may not justify a laboratory's proposal effort, for example.

In the majority of cases services can be purchased. However, the per unit costs to an organization purchasing a small volume of services (for example, drug tests) may be significantly greater than the per unit costs to a large organization purchasing a greater number of identical services. The per test cost for a large purchaser may be a third or less than that for a small purchaser.

Consortia allow several small purchasers to combine their service needs and to buy in bulk, thereby realizing substantial savings.

Greater Expertise. The FTA and DOT regulations are not simple. Although the regulations were carefully crafted, experience from other modes and industries indicates that you may experience situations where it is not clear what your responsibilities are under the regulations. In part, this is intentional. The regulations establish minimum standards. They purposely leave many decisions to local management. Typically, management's position will be reflected in your policy statements and your operating procedures. Beyond this, however, neither FTA nor any other body can anticipate every situation that will arise.

Regardless of who has responsibility for your drug and alcohol program, that manager will almost certainly have additional transit system responsibilities. In the case of the small transit systems, those other responsibilities may be especially varied and some of them quite dissimilar from administration of a substance abuse management program.

Joining a consortium allows employers to pool resources to hire a professional manager to run the drug and alcohol program. Depending upon the size of the consortium, the manager may be full- or part-time, and his/her salary, as well as consortium expenses, may be recovered through the money saved on expenditures for testing services.

A professional consortium manager does not, for example, have to learn the many laws, regulations, policies, and procedures covering day-to-day transit operations. His or her attention need not be

diverted by scheduling or equipment maintenance. The manager can devote full attention to the testing regulations and your drug and alcohol program. He or she can be the expert in this area.

Reduced Administrative Burden. The administrative burden of operating programs in compliance with the regulations can be substantial. Procurement of services, training of employees and program personnel, maintaining chains of custody and collection equipment and facilities, maintaining the random pool and completing random selection and notification, quality assurance, and recordkeeping and reporting can each be time consuming activities. Taken together, they can be daunting to a system that wants to operate a first-class safety program.

A consortium can assume responsibility for any or all of these activities, and because the services are provided for all employers as a whole, the costs to an individual employer are substantially less than if each employer were to provide these services on its own.

Pragmatism. Beyond cost savings and expertise comes practicality. Particularly in small systems, maintenance of a random pool and selection of employees for random testing can be difficult. With only one safety-sensitive employee, it is pretty clear who will be selected. When that safety-sensitive employee is also the program administrator, the odds are that on the day he or she is selected for random testing, the test result will be negative regardless of the program administrator's normal behavior.

The regulations permit you to develop a consortium that pools the safety-sensitive employees of all consortium members for the purposes of random testing. As a result, it is easier to test at the required random rates and there is more uncertainty regarding who will be tested. Larger pools also make it less likely that an individual employee will be repeatedly randomly selected. The larger pool, therefore, is less prone to employee charges of abuse and harassment.

Even in larger systems, the consortium approach to managing random selection has an advantage. Random testing has traditionally concerned employees and their representatives. Some fear that, if an employer wished to "get" an employee, the employer could manipulate the random process to ensure that the employee was selected repeatedly or at specific times. Delegation of the random selection process to the consortium can minimize employer control and employee concerns.

Reduced Liability. Transit operators are rightly concerned about the liabilities of operating a testing program. The FTA regulations were designed to minimize your liability if you are in full compliance with the regulations.

Liability may be either related to employer action or technical liability. Employer action liability corresponds to the normal liabilities of all employers in the course of their business. This would include such items as discrimination, sexual harassment, wrongful discharge, and

harassment in referring personnel for drug or alcohol testing.

Technical liability refers to the potential exposure of operating a testing program. This includes, for example, improper disclosure of personal testing results, improper procedures in collecting/testing the specimen, and misrepresentations of consequences related to test results.

Using a consortium may distance employers from the actual operation of the testing program; however, employers remain liable for program actions. Therefore, employers should exercise due diligence in the selection of a consortium and monitor performance as appropriate. Employers should consult their attorneys for specific information regarding how a consortium might best be structured and operated to minimize liabilities. You should note that the use of consortia does not eliminate your compliance responsibilities under the FTA rules. The consortium is your agent; you are still responsible.

Additional Considerations in Establishing Consortia

Although there are many advantages, particularly for small transit operators, in establishing consortia, the advantages do come at a "cost." You should consider the implications of those costs to your organization prior to establishing or joining a consortium. Other allowances must be made for:

- Shared design
- Reduced control

- Financial considerations.

Shared Design. Since a consortium is essentially a committee and because compromise is inherent in the nature of all committees, it is possible that you may need to compromise on some elements of your drug and alcohol program design and conform to the design wishes of other consortium members. For example, you may join a consortium that has a core of services that comply with the FTA and DOT regulations. Still, that consortium may not offer other elements (e.g., rehabilitation) that you consider important in your program.

Reduced Control. If you operated your own program, the people in charge of it would be your employees, and it would operate according to policies and procedures under your sole control. This will not be the case in a consortium. As a result, it will be more difficult to effect changes in the program, and changes that you do make will take longer than if you operated your own program. Conversely, the consortium may effect changes in the program that you do not wish to have made, but may be powerless to avoid.

Your best protection against this reduced control is a sound contract with the consortium. While you still may not be able to effect unilateral changes, at a minimum you can assure compliance with all applicable laws and regulations. You might also limit the ability of the consortium to make changes without your approval, and might provide for your timely withdrawal

from the consortium if circumstances warrant.

Financial Considerations. Although the net financial results of a consortium should be to reduce your substance abuse program costs, financial risks exist. Failure of some consortium members to pay their costs may increase the financial burden on other members under some consortia models.

In addition, it is a common practice for consortia to require a membership payment when you join in addition to payments for services as they are delivered. This membership payment may support the provision of initial services such as policy development or educational materials. Charging a membership fee is a reasonable and common practice, and, in virtually all cases, the membership fee will be less than the initial investment in an in-house program. Nonetheless, the membership fee may be several times the cost of a single drug test, and small transit providers who anticipate joining consortia should expect the fee and budget accordingly.

Types of Consortia

Consortia arrangements can be made to provide collectively the same types of services as those available through separate or individual contract arrangements (e.g., education and training, specimen collection, laboratory analysis, MRO services). There are a number of models of consortia, each with its own advantages and disadvantages. The following are examples of four such models:

Best Practices

State DOT Involvement

Although the involvement of the State DOT is not required for the establishment of an effective consortium, it can be beneficial. A State DOT played a key role in the establishment of one of the best examples of consortia in the industry. The State DOT contracted with a State University as a part of its program to study alternatives for compliance with FTA's drug testing regulation. The university formed an advisory panel that helped it to deal with some of the key issues facing transit operators, notably small transit operators (making random selection difficult) operating in very rural areas (making access to collection and MRO services difficult). The university determined that a consortium approach would represent the best solution and worked with the transit systems to determine service needs, likely test volumes, and other specifics. Among the most important issues were controlling the costs of the program and making the costs predictable. It was very important that the small providers know in advance how much they would have to pay, and when those payments would be required. A State-wide consortium was already in place serving other industries, notably the criminal justice system and private employers. Although accommodation would need to be made to ensure that policies and procedures conformed to the FTA regulation, the existing consortium provided the basic infrastructure of administration, testing contracts with accredited laboratories, MRO services, and collection sites in every County, thereby allowing the State to establish a program that conformed to the regulations quickly and cost effectively.

- Purchasing cooperative
- Separate entity
- Managing partner
- External management.

Purchasing Cooperative. In a cooperative purchasing model, the consortium contracts for services at a volume price to take advantage of large-volume buying power and management efficiencies. Suppliers would deal directly with each transit agency. This model is analogous to a cooperative formed by a group of small retailers to purchase merchandise at volume discounts. In this case, the cooperative or consortium negotiates terms and conditions with suppliers. The actual orders for and delivery of goods and services, however, are conducted between the individual members and the suppliers.

This model, although useful and in use today by several transit agencies, is not technically considered a consortium under the FTA regulations, since the consortium does not itself provide testing (that is, the consortium members contract directly with the laboratories).

Separate Entity. If the number of safety-sensitive employees represented by all consortium members is large enough, it may be cost effective to form a separate entity. The consortium hires a manager whose responsibility it is to provide services at the cost of purchasing the services, plus the costs incurred in operating the consortium. An analogous example is a food cooperative. Consumers form cooperatives because they want the highest quality product at the lowest price.

Managing Partner. In this model, smaller transit agencies contract for services with larger transit systems or other employers subject to DOT drug and alco-

hol testing regulations (e.g., a trucking company). A large transit system that has the staff and resources to service its own drug and alcohol testing program may also be able to sell surplus staff time to small entities, thereby providing an economic benefit to both. This model is analogous to a limited partnership in which investors pool resources. Usually the investor with the greatest investment becomes the managing partner with the responsibility of managing and making decisions for the partnership.

External Management. This arrangement requires the transit agencies to contract with a company that specifically provides the services desired. The management company should have demonstrated expertise in the transportation substance abuse field. This model is analogous to a pension fund management service or an insurance health benefits manager. A given management company may operate more than one consortium. External management may be considered both by consortia and by individual employers.

A consortium of organizations with a full-time drug and alcohol program manager provides the members with specialized expertise without each member having to hire its own specialist to run a program. This can often prove cost-effective since it spreads administrative costs over a greater base, while providing greater expertise than any consortium member is likely to have on its staff without additional hiring.

In most cases, establishing a consortium will require forming a legal entity. The

Best Practices

Already Existing Consortia

In one State, the transit systems fell under State regulations which required operating personnel to be tested even in the absence of federal regulations. When it was finally determined that the State regulations would apply to transit systems, transit systems had only three weeks to be in compliance. The State DOT needed to find a way to help transit operators who had no programs and, in some cases, no knowledge of drug and alcohol programs, to have fully operational compliant programs in less than a month! Fortunately, motor carriers within the State had been subject to FHWA drug testing regulations for some time and had complied with those regulations through the establishment of a consortium operated by one of the motor carrier companies. The DOT approached the consortium to determine whether it could serve the transit industry within three weeks. The consortium replied that it could serve it within three days, and indeed was able to do so.

Within a week, policies were developed and informational and education materials were printed and distributed to all the transit systems. Personnel from the consortium and from the DOT flew around the State within that same week delivering 6- to 8-hour training sessions regionally. Despite the fact that parts of the State are quite rural, the consortium is able to provide one to three collection sites in 30- to 50-mile radii from each transit system. In the future, the consortium will add mobile vans for collection. The unions have been very supportive of the State program and of the consortium. There have been no labor disagreements over the program. Transit systems and the State DOT report that anxiety over drug and alcohol testing programs has never been lower than since the State program and consortium were implemented.

consortium would probably operate as a nonprofit corporation. The consortium would have power to conduct business for its members, enter into contracts, and be their legal representative according to a charter and by-laws. A governing board of the members would be responsible for managing the consortium.

One exception to the need to form a separate corporation might include the managing partner model when a small transit agency enters into a contract with a larger transit agency. Another exception would occur when a single transit agency contracts with an external management company.

The Importance of Your Consortium Contract

Regardless of the model of consortium you select, you should realize that you are entering into a contractual relationship, and your interests should be protected. Although you are implementing the regulations through a consortium, you remain responsible to FTA for implementing those regulations. This means that if the consortium is implementing some aspect of the program incorrectly, your system is implementing it incorrectly. You should exercise due diligence in selecting a consortium, and in monitoring consortium operations.

Federal law prohibits FTA from funding your transit system if you are out of compliance with the alcohol misuse or prohibited drug regulations. It is therefore in your interest to exercise your best management practices both before and

Best Practices

State Grants

Another example of how the State DOT can help establish a consortium is by providing grants to transit districts to organize and manage the consortium.

The transit district developed an RFP for turnkey management of the consortium. After mailing more than two dozen RFPs to prospective vendors, the transit district and the State DOT jointly interviewed four finalists and chose a contractor who had been providing services for more than three years. The transit district monitors the program and the contractor, receiving summary statistical reports only. No information specific to the employees of other transit district members of the consortium is provided to it. The contractor provides all services including random selection, collection services, contracting with DHHS-approved laboratories, MRO, BAT, and litigation support. The contractor also provides a 24-hour hotline staffed by knowledgeable professionals ready to respond to any employee testing situation.

The consortium manager says that she "would not run a program any other way than with a consortium and external manager" because of the high quality of service, consistency, and confidentiality that such an approach accords.

after the selection or establishment of a consortium.

Depending upon your needs and those of other consortium members, you may purchase a variety of required or optional services from the consortium. Also, depending upon how the consortium is structured, you may be required to purchase all services or may only purchase

those you require on an as-needed basis. A menu of services might include any or all of the following:

- Policy development
- Program implementation
- DHHS-certified laboratory specimen analysis
- Collection services
- Mobile or on-site collection services
- BAT (breath analysis technician)
- EBT (evidentiary breath testing) equipment
- SAP (Substance Abuse Professional)
- MRO (Medical Review Officer)
- Employee and supervisor training
- Employee Assistance Program alternatives
- Consultation services
- Random testing—selection and management
- Quality control (blind sample) programs for drug testing
- Recordkeeping
- Federal report preparation.

Regardless of the services you obtain from the consortium, however, you should have a written contract with the consortium manager. The contract should specify

- The specific services you are purchasing.
- The price you will pay and how it is calculated, the schedule upon which you will pay, and any discounts to which you may be entitled.
- That all services will be delivered in accordance with 49 CFR parts 40, 653, and 654, and other applicable Federal laws and regulations; that it is the responsibility of the consortium manager to stay current on these requirements; and that the consortium manager will immediately change consortium policies and procedures to comply with changes in laws and regulations. You will agree to renegotiate fees retroactively to the date of the change within 45 days after the change becomes effective if sufficient time is not available prior to the change.
- The contract term. Because drug testing prices have fallen steadily, it is probably in your best interest not to negotiate for a term of more than one year unless you have the right to renegotiate price at the end of a year. It is anticipated that initial alcohol testing costs will also decline over several years. Both parties should have the right to break the contract for cause, and you should be able to withdraw on 60 days written notice.
- That you have the right to examine consortium facilities, records, and procedures at your expense upon reasonable notice (e.g., one week). Review of BAT, urine collection site service records, MRO files, and laboratory reports will be conducted by a transit agency official or a third party authorized to access such con-

fidential records and who will hold personal information in confidence.

- That you will receive monthly reports of activities related to your transit agency. If those services include testing or training, the reports will be in a format analogous to the annual reports required by FTA. The monthly reports will include both monthly and year-to-date statistics. The consortium will be responsible for preparing appropriate parts of the MIS report for the transit system's submission to FTA (see Figure 9-2).
- Timeliness requirements. Since the consortium potentially adds an additional administrative layer to your testing program, you must ensure that it acts expeditiously to avoid negative effects on your employees or your operations through unnecessary reporting delays. You may wish to negotiate liquidated damages clauses for consortium failures in this area.
- Quality control requirements. The consortium should implement appropriate quality control procedures, including blind sample laboratory specimens for drug testing, as required.

How to Explore Consortia Further

If you think that a consortium is an option your transit system should consider, here are some things you might do to get more information:

- Contact other transit systems participating in consortia, ask about their experience, and find out whether

their approaches might work for you.

- Consider which of the consortium models might best serve your needs. As discussed above, the cooperative purchasing model is not technically a consortium under FTA regulations. Still, if all you are interested in is better pricing, then this may be a viable program approach for you. You may find such a purchasing cooperative already in place through local organizations such as Chambers of Commerce.



Separate Entity Model. If you believe the separate entity model might be best, you have two options: to create or to buy. There may be an existing consortium, perhaps providing testing services to State government or to another transportation mode, which you might join.

Remember, though, other transportation modes subject to their own USDOT regulations may have regulatory requirements that differ from those of the transit industry. You must ensure that the consortium will comply with the FTA regulations in all respects. In addition, if the existing consortium does not provide all required services, you must make separate arrangements for those services. Your system might provide them internally or purchase them elsewhere.

Forming your own consortium from scratch might be the best approach for ensuring that the consortium will be fully compliant with FTA regulations. If you pursue this model, you will need to identify other transit agencies interested in participating. Your personal network, State-wide

transit association, or State department of transportation may be useful in identifying other interested transit agencies, just as they might be useful in helping you identify existing consortia that you might choose to join.

Managing Partner Model. If you are a small transit operator with a neighboring large transit operator, this may be a particularly attractive model. Contact the large transit operator to determine how that operator is implementing the drug and alcohol regulations. Many large operators have had their own programs for many years, and they may be able to accommodate your needs fairly effortlessly and inexpensively. Also contact your State transportation department, which may operate a program and may be able to accommodate your needs as well.

External Management Model. This model is really a subcategory of the other models. Each of the other models might be internally or externally managed. Indeed, even in the absence of a consortium, an individual transit agency might

choose to contract out the management of its substance abuse program.

Many national and regional management companies provide services of varying quality in this area. Some are excellent and may provide you with a better program than you could operate on your own. Others may leave you out of compliance with the FTA regulations. The experience of other employers, particularly transit agencies, will be your best guide. As you select a management company, remember to check references thoroughly and to employ a detailed written contract specifying your requirements.

Best Practice

Pooling Resources

A consortium of seven transit agencies was established to pool talents in an effort to meet the FTA regulations.

Due to the geographic closeness and density of populations served by the transit agencies, the consortium members felt it would be beneficial to collectively develop as much of the drug and alcohol testing program as they could, each member pulling from its own special areas of expertise.

As it turned out, the consortium members worked collectively to develop common RFPs, contract specifications, and common language for policy statements. However, each transit agency developed its own policy and program using parts of the consortium-developed material.

One area of special value to the consortium members was the ability to pool employees and to obtain a better price for services such as collection services and laboratory analysis. Another advantage with this consortium approach was that it gave the organizations a chance to hear other's opinions on how to implement the regulations, as well as different "readings" or understandings of the regulations.

This type of consortium approach to developing a drug and alcohol program is a model of how multiple transit agencies, pooling individually limited resources, are able to develop a far more comprehensive and sound program than they would be able to do individually.



Chapter 12.

BUSINESS ANALYSIS

Transit agencies instituting FTA-mandated drug and alcohol testing programs will incur costs to perform certain activities, such as to write policies, train employees and supervisors, notify employees that they need to be tested, perform tests, and analyze the results. These and related costs were calculated for the entire transit industry when the drug and alcohol rules were written. Summaries of these costs can be found in the Economic Analy-

sis section of the final rules that were published in the *Federal Register*, on February 15, 1994 (see Appendix I).

Your transit agency may incur other costs as well, depending on local policy decisions that are beyond the requirements of the FTA. For example, you may choose to test for additional drugs, to remove employees from duty immediately following a reasonable suspicion test while waiting for results from the laboratory, to require follow-up testing for longer than one year, or to offer rehabilitation to employees. These costs, because they result from

activities not required by the FTA, were not included in the regulatory impact analyses.

To assist your planning and budgeting efforts, costs were calculated for a typical, but hypothetical, transit agency to comply with the drug and alcohol rules (Figures 12-1 and 12-2). These calculations were made using the same computer model used in the regulatory impact analyses for the FTA rules. Several key "drivers" of costs are described in the tables. Keep in mind that these are industry-wide values, based on several surveys from 1991 through 1993. Your costs and rates will undoubtedly vary due to differences in number of employees, distances to testing locations, positive rates, additional activities, etc.

Best Practices

Business Analysis

One transit agency's experience demonstrates the benefits of a thoughtful business analysis. The agency was interested both in EAP and drug testing services. Because it had been conducting drug testing for several years and was aware of those costs, its main uncertainty regarded the costs of EAP services and whether it would be more cost beneficial to provide these services in-house or to contract them out. The agency's intent was to provide a full range of services to its employees and their families. These services would include more than simply assessing and counseling those testing positive for drug usage, although the latter was an important program component. Finally, it was important to this particular transit agency that the EAP offices be located off-premises since it was felt that this would enhance confidentiality and encourage voluntary use of the resource by employees.

The transit agency first looked at typical EAPs in the public sector to assist in its decision. It looked at what it considered to be comparable transit systems to see what their approaches were, but found most of these systems too large for direct comparison. It also looked at City, County, and State EAPs. Finally, it reviewed the EAPs and approaches of the private sector.

The agency next considered the costs of operating its own program. With minimum staffing (one licensed professional who met minimum qualifications and one secretary), the agency estimated annual salary costs at \$80,000, plus benefits. When equipment (e.g., computer, software, appropriate filing cabinets), off-premises counseling and administrative space, and supplies were added, the estimated annual cost rose to over \$150,000.

Next, the agency solicited bids from contractors to provide both its EAP and drug testing services. The system received 8 bids all in the \$60,000 to \$65,000 range, or less than half the cost of providing the services themselves. One of the bids was accepted and the transit agency now receives drug testing and EAP services from an outside vendor.

Figure 12-1. Factors in Calculating What It Will Cost Hypothetical Transit Agency Subject to the FTA Drug and Alcohol Testing Regulations: Inputs

Item	Value	
Number of safety-sensitive employees (including supervisors who perform safety-sensitive functions)	250 (and growing at ½ of 1% per year)	
Number of supervisors who must be trained to perform reasonable suspicion determinations	20 (and growing at ½ of 1% per year)	
Number of Tests Administered and Number of Positive Results	Drug Testing	Alcohol Testing
Number of tests given each year (average over first 10 years)		
Pre-employment	21	36
Reasonable Suspicion	15	15
Post-Accident	60	60
Random	125	16
Return to Duty/Follow-Up	37	17
Total	258	144
Number of positive tests each year (average over first 10 years)		
Pre-employment	1.1	0.2
Reasonable Suspicion	1.1	2.1
Post-Accident	2.6	1.3
Random	3.4	0.1
Return to Duty/Follow-Up	2.1	1.8
Total	10.3	5.5

Item	Cost	
	Drug Testing	Alcohol Testing
Year 1*	\$44,472	\$20,197
Years 2 through 10 (average of each year)	\$36,088	\$13,673
Total for 10 years	\$369,264	\$143,254
Per safety-sensitive employee, per year	\$148	\$57

* Year 1 costs are higher due to program startup costs and training. Please see Chapter 1, "Introduction," for a discussion of which year each type of transit agency is required to begin testing.

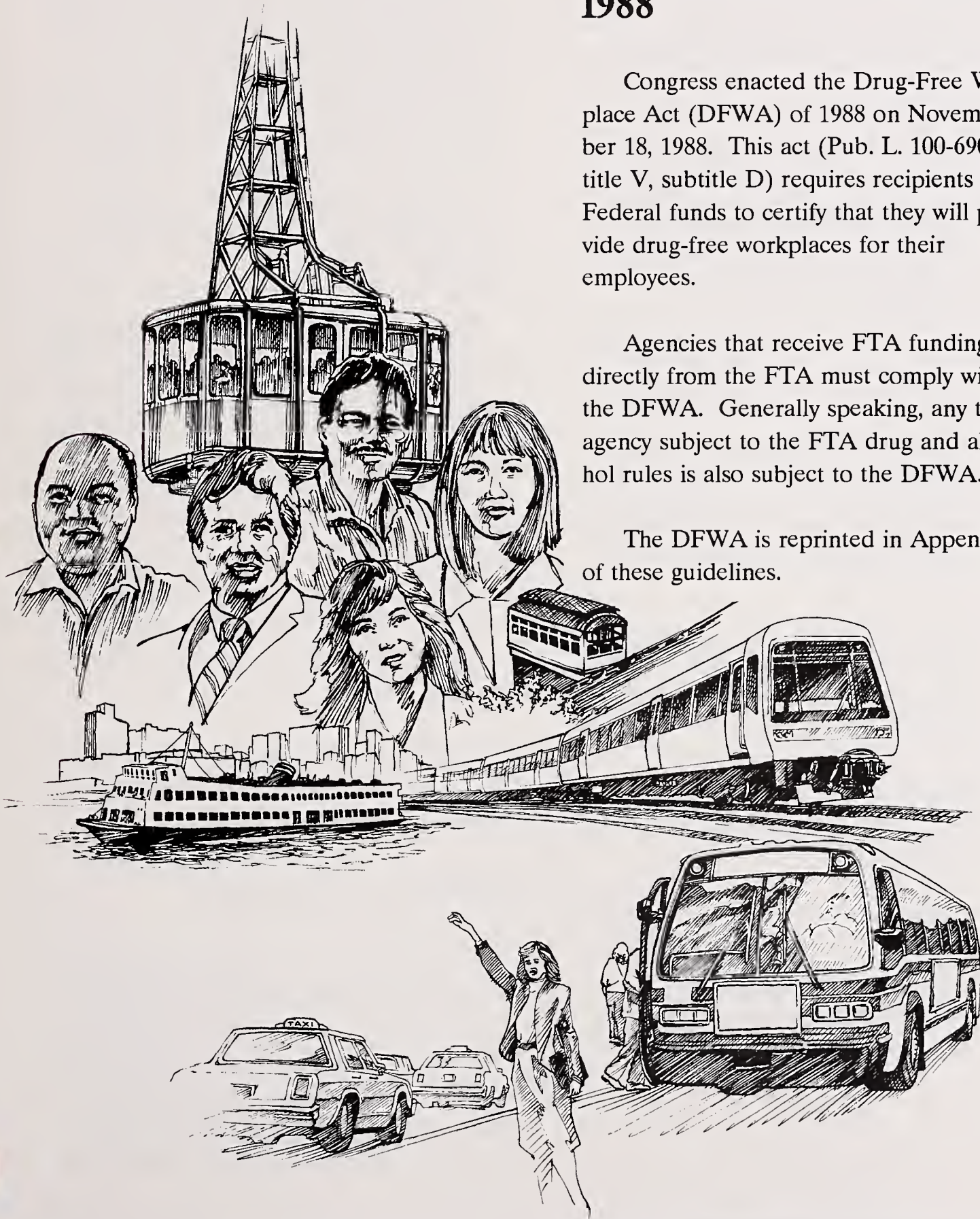
Chapter 13.

THE DRUG-FREE WORKPLACE ACT OF 1988

Congress enacted the Drug-Free Workplace Act (DFWA) of 1988 on November 18, 1988. This act (Pub. L. 100-690, title V, subtitle D) requires recipients of Federal funds to certify that they will provide drug-free workplaces for their employees.

Agencies that receive FTA funding directly from the FTA must comply with the DFWA. Generally speaking, any transit agency subject to the FTA drug and alcohol rules is also subject to the DFWA.

The DFWA is reprinted in Appendix I of these guidelines.



Section 1. REQUIREMENTS

This act applies to direct recipients of Federal monies of \$25,000 or more. To comply with the act, recipients must

- Certify that their workplaces are drug-free.
- Publish and distribute a written policy on substance abuse that notifies employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the workplace.
- Make an ongoing, good faith effort to maintain a drug-free workplace.
- Establish an employee education program that informs employees of the dangers of drug abuse, the employer's written policy provisions, and the possible penalties for drug abuse violations.
- Require each employee to notify the transit agency within five days of any criminal drug statute conviction for a violation occurring in the workplace.
- Notify the Federal government of each violation within 10 days of notification from the employee.
- Within 30 days following conviction, impose sanctions on the employee. These sanctions include (1) appropriate personnel action or (2) the employee's satisfactory participation in a rehabilitation program.

Section 2. GRANT CERTIFICATION

For the purposes of this act, the term "grant" includes only direct assistance from the FTA to a grantee. That is, if a Federal agency provides financial assistance to a State, which in turn passes the assistance to the transit agency, only the State agency that receives the assistance directly (and not the local transit agency) is required to make a drug-free certification under the regulation.

A grantee is required to make the certification for each grant. The one exception to this rule is for a State, including a State agency. A State may elect to make a single annual certification to the FTA from which it obtains grants, rather than making a separate certification for each grant. Consequently, if a State agency receives grants under a number of different programs from the FTA, only one certification, rather than multiple, annual certifications, has to be made.

The FTA DFWA Certification is provided in the Sample Documentation section at the end of this chapter.

Section 3. SANCTIONS

The imposition of sanctions under this act requires a written determination of violation from the "agency head" or designee. The first ground for sanctions is false certification (e.g., an employee awareness program was never established). The second ground for violation of the act is failure to

comply with the requirements of the certification (e.g., the employee awareness program that was established was not ongoing). The third is that "such a number of employees of the grantee" have been convicted of criminal drug statute violations occurring in the workplace "as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace."

It is important to note that criminal drug statute violations by employees not occurring in the workplace would not trigger sanctions. Likewise, indication of drug abuse by employees in the workplace that does not result in criminal convictions would not trigger sanctions.

Violations of the act may result in (1) suspension of payments under the

grant, (2) suspension or termination of the grant itself, or (3) suspension or debarment of the recipient. The decision of which sanction or sanctions to apply in a particular case is left to the discretion of the FTA. As with other debarments, the debarred recipient is ineligible for any award from any Federal agency during the term of the debarment, which may be up to five years in the case of a debarment under this act. The agency head may waive with respect to a particular grant, in writing, a suspension if the agency head determines that such a waiver would be in the public interest. This authority cannot be delegated to any other Federal official.

The DFWA does not require that employers test employees for drugs or alcohol or for employers to pay the cost of rehabilitation.

Sample Documentation

Sample Documentation

DRUG-FREE WORKPLACE ACT CERTIFICATION
FOR A PUBLIC OR PRIVATE ENTITY

1. The _____
(Name of Applicant for a Grant or Cooperative Agreement)
certifies that it will provide a drug-free workplace by:

- (a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the Applicant's workplace and specifying the actions that will be taken against employees for violation of such prohibition;
- (b) Establishing an ongoing drug-free awareness program to inform employees about--
 - (1) The dangers of drug abuse in the workplace;
 - (2) The Applicant's policy of maintaining a drug-free workplace;
 - (3) Any available drug counseling, rehabilitation, and employee assistance programs; and,
 - (4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;
- (c) Making it a requirement that each employee to be engaged in the performance of the grant or cooperative agreement be given a copy of the statement required by paragraph (a);
- (d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant or cooperative agreement, the employee will--
 - (1) Abide by the terms of the statement; and
 - (2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;
- (e) Notifying the Federal agency in writing, within ten calendar days after receiving notice under subparagraph (d)(2) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to every project officer or other designee on whose project activity the convicted employee was working, unless the Federal agency has designated a central point for the receipt of such notices. Notice shall include the identification number(s) of each affected grant or cooperative agreement.

(f) Taking one of the following actions, within 30 calendar days of receiving notice under subparagraph (d)(2), with respect to any employee who is so convicted--

- (1) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or
- (2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e), and (f).

2. The Applicant's headquarters is located at the following address. The addresses of all workplaces maintained by the Applicant are provided on an accompanying list.

Name of Applicant:

Address:

City:

County:

State:

Zip code:

(Signature of Authorized Official)

(Title of Authorized Official)

(Name of Applicant)

(Date)

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Appendix A

Acronyms

Appendix A. Acronyms

AA	Alcoholics Anonymous
ADA	Americans with Disabilities Act
BAT	Breath Alcohol Technician
CDL	Commercial Driver's License
CFR	Code of Federal Regulations
DFWA	Drug-Free Workplace Act
DHHS	Department of Health and Human Services
DOT	Department of Transportation
EAP	Employee Assistance Program
EAPA	Employee Assistance Professional Association
EASNA	Employee Assistance Society of North America
EBT	Evidential Breath Testing (device)
EMIT	Enzyme Multiplied Immunoassay Technique
FAA	Federal Aviation Administration
FHWA	Federal Highway Administration
FPIA	Fluorescein Polarization Immunoassay
FRA	Federal Railroad Administration
FTA	Federal Transit Administration
GC	Gas Chromatograph
GC/MS	Gas Chromatography/Mass Spectrometry
MRO	Medical Review Officer
MS	Mass Spectrometer
NCADI	National Clearinghouse for Alcohol and Drug Information
NHTSA	National Highway Traffic Safety Administration
NIDA	National Institute on Drug Abuse
NTSB	National Transportation Safety Board
PCP	Phencyclidine
PM	Program Manager
RFP	Request for Proposal
RIA	Radio Immunoassay
RSPA	Research and Special Programs Administration

SAID	Substance Abuse Information Database
SAMHSA	Substance Abuse Mental Health Services Administration
SAP	Substance Abuse Professional
SAPAA	Substance Abuse Program Administrators Association
SS	Safety-Sensitive
THC	delta-9-tetrahydrocannabinol (marijuana)
UMTA	Urban Mass Transportation Administration
USCG	United States Coast Guard

Appendix B
Additional Resources

Appendix B. Additional Resources

Newsletters

Business Research Publications. *Drugs in the Workplace*, BRP Publications, Inc., 817 Broadway, New York, NY 10013, (212) 673-4700.

Institute for a Drug-Free Workplace. *The Drug-Free Workplace Report*, Institute for a Drug-Free Workplace, 1301 K Street, N.W., East Tower, Suite 1010, Washington, D.C. 20005, (202) 842-7400.

PaceCom Incorporated. *Drug Detection Report*, Pace Publications, 443 Park Avenue South, New York, NY 10016, (212) 685-5450.

Washington Crime News Services. *Narcotics Demand Reduction Digest*, Washington Crime News Services, 3918 Prosperity Ave., Suite 318, Fairfax, VA 22031, (703) 573-1600.

Buraff Publications. *The National Report on Substance Abuse*, 1350 Connecticut Ave., N.W., Suite 1000, Washington D.C. 20036-1701, (202) 862-0990.

First Health Group. *Small Business Employee Assistance*, First Health Group, P.O. Box 21, Merrifield, VA 22116, (703) 818-7682.

FTA Publications

Urban Mass Transportation Administration, *Random Drug Testing Manual*, September 1991, National Technical Information Service, Springfield, VA 22161.

Urban Mass Transportation Administration, *Substance Abuse in the Transit Industry*, November 1991, National Technical Information Service, Springfield, VA 22161.

Urban Mass Transportation Administration, *Employee Assistance Program for Transit Systems*, September 1991, Report No. UMTA-CT-06-0020-1, National Technical Information Service, Springfield, VA 22161.

Databases

U.S. Department of Labor, *Substance Abuse Information Database (SAID)*, 1-800-775-SAID.

Professional Associations

American Association of Medical Review Officers, 6320 Quadrangle Drive, Suite 340, Chapel Hill, NC 27514.

American College of Occupational and Environmental Medicine, 55 West Seegers Road, Arlington Heights, IL 60005.

Employee Assistance Professionals Association (EAPA), 4601 North Fairfax Drive, Suite 1001, Arlington, VA 22203

Employee Assistance Society of North America (EASNA), 2728 Phillips, Berkeley, MI 48072.

National Association of Alcoholism and Drug Abuse Counselors, 3717 Columbia Pike, Suite 300, Arlington, VA 22204-4254.

Substance Abuse Program Administrators Association (SAPAA), P.O. Box 158694, Nashville, TN 37215-8694.

Department of Labor Publications

U.S. Department of Labor. *An Employer's Guide to Dealing with Substance Abuse*, October 1990, The National Clearinghouse for Alcohol and Drug Information, P.O. Box 2345, Rockville, MD 20847, 1-800-729-6686; FAX (301) 468-6433.

U.S. Department of Labor. *What Works: Workplaces Without Alcohol and Other Drugs*, October 1991, The National Clearinghouse for Alcohol and Drug Information, P.O. Box 2345, Rockville, MD 20847, 1-800-729-6686; FAX (301) 468-6433.

U.S. Department of Labor. *What Works: Workplaces Without Drugs*, August 1990, The National Clearinghouse for Alcohol and Drug Information, P.O. Box 2345, Rockville, MD 20847, 1-800-729-6686; FAX (301) 468-6433.

Additional Resources

Center for Substance Abuse Protection, (1-800-843-4971)

Model Plan for a Comprehensive Drug-Free Workplace Program, 1990, DHHS Publication No. (ADM) 90-1635, The National Clearinghouse for Alcohol and Drug Information, P.O. Box 2345, Rockville, MD 20847, 1-800-729-6686; FAX (301) 468-6433.

Comprehensive Procedures for Drug Testing in the Workplace, 1991, DHHS Publication No. (ADM) 91-1731, The National Clearinghouse for Alcohol and Drug Information, P.O. Box 2345, Rockville, MD 20847, 1-800-729-6686; FAX (301) 468-6433.

Publications Catalog, 1993, The National Clearinghouse for Alcohol and Drug Information, P.O. Box 2345, Rockville, MD 20847, 1-800-729-6686; FAX (301) 468-6433.

Blind Sample (Quality Control), A listing of the organizations that provide samples can be received from DHHS, Division of Workplace Programs, (301) 443-6014.

FTA Safety & Security Bulletin Board (1-800-231-2061).

Appendix C

Americans with Disabilities Act Discussion

Appendix C. Americans with Disabilities Act Discussion

This discussion is reprinted from the February 15, 1994 *Federal Register* (59 FR 7311) for your reference. The Department referenced here refers to the Department of Transportation.

The Americans with Disabilities Act and DOT Drug and Alcohol Testing

The Americans with Disabilities Act of 1990 (ADA) (Pub. L. 101-36) does not, in any way, preclude or interfere with employers' compliance with the Department's new or existing drug and alcohol testing regulations. However, Title I of the ADA, which prohibits discrimination against a "qualified individual with a disability," may affect the personnel actions an employer might wish to take with respect to some individuals who test positive for alcohol or drugs, or otherwise violate the prohibitions of the Department's drug and alcohol rules.

Title I covers employers who have 15 or more employees for more than 20 calendar weeks in a year (§101(5)(A)). (Until July 26, 1994, only employers with 25 or more such employees are covered.) Covered employers may not discriminate against a qualified individual with a disability with respect to applications, hiring, advancement, discharge, compensation, or other terms, conditions, or privileges of employment (§102(a)).

Before discussing the effect Title I may have on an employer personnel action following a positive DOT-mandated drug or alcohol test or other violations of DOT drug and alcohol rules, it is important to note the specific ADA provisions that address DOT drug and alcohol rules. The ADA specifically authorizes employers covered by DOT regulations to require their employees to comply with the standards established in those regulations, including complying with any rules that apply to employment in safety-sensitive positions as defined in the DOT regulations (§104(c)(5)(C)). By authorizing employers to require employees to comply with the standards in DOT rules, this provision authorizes compliance not only with testing provisions of the rules, but also of other drug- and alcohol-related provisions that affect safety-sensitive employees (e.g., pre-duty abstinence, on-the-job use). The legality under the ADA of employer compliance with DOT drug and alcohol requirements other than those concerning testing is underlined by several other provisions of Title I. An employer may prohibit the use of drugs and alcohol in the workplace, may require that employees not be under the influence of alcohol or be engaging in the illegal use of drugs in the workplace, and may require that employees conform to the requirements for the Drug-Free Workplace Act (Pub. L. 100-690, Title V, Subtitle D) (§104(c)(1-3)).

Concerning drug and alcohol testing and its consequences, the statute further provides that nothing in Title I shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to (1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and (2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c). (Subsection (c) includes the statutory language cited above [§104(e)].) These ADA provisions clearly specify that the ADA does not interfere with the compliance by covered employers with

DOT regulations concerning drug and alcohol use, including requirements for testing and for removing persons who test positive from safety-sensitive functions. Under the ADA, an employer is not viewed as “discriminating” for following the mandates of DOT drug and alcohol rules.

In considering the effects on the personnel actions that employers choose to take after a safety-sensitive employee tests positive for drugs or alcohol or otherwise violates DOT drug or alcohol rules, it is important to note that the ADA’s prohibition of employment discrimination applies only with respect to a “qualified individual with a disability.” The ADA specifically provides that an employee or applicant who is currently engaging in the illegal use of drugs is **not** a “qualified individual with a disability” (§104(a)). The ADA does not protect such an employee from adverse personnel actions. For purposes of the ADA, the drugs that trigger this provision are those the use, possession, or distribution of which is prohibited by the Controlled Substances Act (§101(6)). The five drugs for which DOT mandates tests fit this definition (alcohol is not a drug covered by the Controlled Substances Act).

What does “currently engaging” in the illegal use of drugs mean? According to the Equal Employment Opportunity Commission (EEOC), whose rules carry out Title I, the term “currently engaging” is not intended to be limited to the use of drugs on the day of, or within a matter of days or weeks of, the employment action in question. Rather, the provision is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct (56 FR 35745-46, July 26, 1991). It is clear that an individual who has a positive result on a DOT-mandated drug test is currently engaging in the illegal use of drugs. Therefore, under Title I, an employer may discharge or deny employment to an individual who has a positive result on a DOT-mandated drug test.

This provision that an individual who is currently engaging in the illegal use of drugs is not a “qualified individual with a disability” does not apply, of course, if the individual is **erroneously** regarded as engaging in the illegal use of drugs. In addition, if an individual, even a former user of illegal drugs, is not currently engaging in the illegal use of drugs and (1) has successfully completed a supervised rehabilitation program or otherwise has been successfully rehabilitated, or (2) is participating in a supervised rehabilitation program, the individual can continue to be regarded as a “qualified individual with a disability,” if the individual is otherwise entitled to this status (§104(b)). An employer may seek reasonable assurance that an individual is not currently engaging in the illegal use of drugs (including requiring a drug test) or is in or has completed rehabilitation. Some employers (EEOC uses the example of a law enforcement agency) may also be able to impose a job qualification standard that would exclude someone with a history of drug abuse if it can show that the standard is job-related and consistent with business necessity (56 FR 35746, July 26, 1991).

Unlike the situation with respect to current use of illegal drugs, the use of alcohol contrary to law, Federal regulation, or employer policy does not deprive an individual of status as a “qualified individual with a disability” that he or she would otherwise have under Title I. An individual is protected by Title I, however, only if the individual has a disability in the first place. (This is also true with respect to a former drug user or any other individual who seeks the protection of the ADA.) To have a disability, an individual must have a “physical or mental impairment that substantially limits one or more major life activities of such individual, a record of such impairment, or being regarded as having such impairment” (§1(2)). While, as the EEOC notes in its Title I regulation, “individuals disabled by alcoholism are accorded the

same protections accorded other individuals with disabilities” (56 FR 35752, July 26, 1991), not all individuals who use alcohol in violation of the law, Federal regulation, or employer policy are “disabled by alcoholism.”

The courts interpreting section 504 of the Rehabilitation Act of 1973 (with which ADA employment provisions are intended to be consistent) have concluded that alcoholism can be a disability which may call for reasonable accommodation. See, e.g., **Walker v. Weinberger**, 600 F.Supp. 757 (D.D.C., 1985); **Tinch v. Walters**, 765 F.2d 599 (6th Cir., 1985); **McKelvey v. Walters**, 596 F.Supp. 1317 (D.D.C., 1984); **Anderson v. University of Wisconsin**, 665 F.Supp. 1372 (W.D. Wis., 1987), *aff’d* 841 F.2d 737 (7th Cir., 1988); **Richardson v. Postal Service**, 613 F.Supp. 1213 (D.D.C., 1985); and, **Sullivan v. City of Pittsburgh**, 811 F.2d 171 (3rd Cir., 1987).

The logic of the ADA, and EEOC’s regulatory provisions implementing the statute, suggest that, in determining whether an employee or applicant who has a positive result on a DOT-mandated alcohol test or otherwise violates a DOT alcohol rule is disabled by alcoholism, the employer would answer two questions. First, does the individual have a physical or mental impairment; e.g., is the individual an alcoholic? (People who test positive for alcohol are not necessarily alcoholic.) This question would probably have to be answered with the assistance of a physician or substance abuse professional. Second, if the individual is an alcoholic, does this impairment substantially limit a major life activity or is it (even erroneously) regarded as substantially limiting a major life activity? This question would be answered on a case-by-case basis, following EEOC’s guidelines (see 56 FR 35740-44, July 26, 1991). Under DOT’s alcohol prevention rules, these determinations will be made by or in cooperation with the substance abuse professional that the rules require to be involved following a positive test or rule violation.

The determination of whether an individual is a qualified individual with a disability is made in two steps: (1) whether the individual has the appropriate education, experience, skills, and licenses, and meets the other prerequisites of the position; and (2) whether the individual can perform the essential functions of the job desired or held with or without reasonable accommodation. Essential functions are the functions that the individual holding the position must be able to perform unaided or with reasonable accommodation. Several factors are considered in determining whether a job function is essential, including whether the employer actually requires employees in the position to perform the function, whether the position exists to perform the function, whether there are other employees who could perform the function, and whether there is a high degree of expertise or skill required to perform the function.

If the individual is qualified and determined to be disabled by alcoholism, then the employer may not discriminate against the individual on the basis of his or her disability and, if job performance and behavior are not affected by alcoholism, must make “reasonable accommodations” to the individual’s known physical or mental limitations, **unless** the employer can demonstrate that doing so would impose an “undue hardship” on the employer’s business.

The selection of an appropriate “reasonable accommodation” is done on a case-by-case basis, as EEOC guidance provides (see 56 FR 35744, July 26, 1991). Reasonable accommodation for an individual disabled by alcoholism could include such actions as referral to an Employee Assistance Program or other rehabilitation program, provision of rehabilitation

services, and giving an employee sufficient time to demonstrate that rehabilitation has been successful. See, e.g., **Washington v. Department of the Navy**, 30 M.S.P.R. 323 (1986); **Swafford v. Tennessee Valley Authority**, 18 M.S.P.R. 481 (1983).

Even when an individual is disabled by alcoholism, however, the employer is not required to provide a reasonable accommodation that creates an "undue hardship." Undue hardship involves significant difficulty or expense in, or resulting from, providing an accommodation. EEOC describes an undue hardship as "an accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business" (Id). This concept takes into account the financial resources of the employer (e.g., an accommodation that would be reasonable for a large business may be an undue hardship for a small business). But the concept is not limited to financial difficulty. For example, if a small trucking company determined that the accommodation that one of its drivers needed for an alcoholism-related disability was lengthy in-patient rehabilitation, the company not only might find the accommodation beyond its financial resources, but also too disruptive of its operations (i.e., a temporary replacement would have to be hired or the work of the firm be reduced significantly).

Under Title I, an employer may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance or behavior as it holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of the employee (§104(c)(4)). For example, if, as the result of alcoholism, an employee is chronically late or absent, or makes frequent job errors, the employee would be subject to personnel action on the same basis as any other employee who exhibited similar behavior for other reasons. (However, if the alcoholic employee were subjected to personnel actions that were not used against non-alcoholic employees who were chronically late or absent, or made frequent job errors, then the alcoholic employee might have a cause of action under the ADA.) The employer is not precluded from accommodating this alcoholic employee, but is not required to do so.

It should also be pointed out that the ADA does not preclude an employer from disciplining or dismissing an employee who commits a violation of the employer's conduct and performance standards, even if the individual is an alcoholic or has another disability. For example, a violation of a DOT operating administration's alcohol misuse rules (e.g., a test demonstrating a prohibited alcohol concentration) could be a violation of the employer's performance and conduct rules, for which the employer's policy could call for the employee's dismissal. This result would not violate the ADA.

There are also situations in which meeting qualification standards of DOT safety rules, or having a valid license or certificate from a DOT operating administration, is an essential job qualification. If a truck driver does not meet FHWA qualification standards to obtain a Commercial Driver's License from a State, or if a pilot does not qualify for an FAA medical certificate, that individual is not a "qualified individual with a disability," even if the reason for the failure to meet DOT qualifications is a condition that an employer might be required to accommodate under the ADA. The legislative history of the ADA specifically recognizes this special status for DOT qualification standards (see *Senate Report 101-116* at 27, August 30, 1989).

Another issue that has been raised in context of the relationship between the ADA and alcohol testing concerns whether an alcohol test is a "medical examination." Non-regulatory guidance issued by the EEOC suggests that "a test to determine an individual's blood alcohol level would be a 'medical examination' and only could be required by an employer in conformity with the ADA." It should be pointed out that this statement does not, on its face, apply to breath testing (or other methods that do not involve blood samples) for alcohol. The EEOC has not determined whether it views breath testing for alcohol as a "medical examination."

The Department of Transportation takes the position that alcohol testing under the program required by these rules is not properly viewed as a required medical examination. It is not the collection of a breath or body fluid sample that makes a test "medical" in nature. The tests in question are solely for the purpose of determining whether an employee has violated a DOT-mandated safety requirement. The tests are not used for any diagnostic or therapeutic purpose. They are not intended to ascertain whether an employee has any medical condition, and they will not be used for such a purpose. Under these circumstances, the policies underlying the ADA provisions on medical examinations do not apply. Because of the uncertainty that may be created by the EEOC guidance, however, it is useful to consider the implications of regarding alcohol tests as "medical examinations." (The Department is working with the EEOC to resolve this uncertainty.)

Even if alcohol tests are considered to be "medical examinations" for ADA purposes, the effects on compliance with DOT-mandated alcohol testing would be minimal. "Medical examinations" are permitted by the ADA if made after a conditional offer of employment. The pre-employment testing approach set forth in the rules clearly fits this model. For this reason, as well as for reasons of efficiency, the Department believes that conducting pre-employment testing after an offer of employment, but before the first performance of a safety-sensitive function, has much to recommend it. In addition, EEOC has stated to the Department that, because of the statutory requirement in the Omnibus Transportation Employee Testing Act of 1991 for pre-employment testing, EEOC does not object to pre-offer alcohol testing under the DOT rules mandated by this statute. Other types of testing mandated by these rules, such as reasonable suspicion, post-accident, and random testing, are likewise acceptable under ADA. (See 29 CFR 1630.15(e), which makes compliance with the requirements of Federal law or regulation a defense to an allegation of discrimination under Title I of the ADA.) Congress passed the Omnibus Act more than a year after it passed the ADA, and the former statute's specific mandates for various types of testing clearly, as a matter of statutory interpretation, would prevail over any contrary inferences anyone would attempt to draw from the more general provisions of the latter.

A related issue concerns the confidentiality of the records of alcohol tests. To the extent that an alcohol test is regarded as a medical examination, the records of the test would be "treated as a confidential medical record" under the ADA (see §102(c)(3)(B) of the ADA). Under this provision, records of a medical examination are required to be kept in a separate medical file. The purpose of any requirement for confidentiality of a medical record is to safeguard the employee's right of privacy with respect to personal medical information. An employee may, of course, waive such a right. (As a general matter, medical confidentiality provisions allow a patient to permit medical information to be provided to third parties.) The DOT rules, by requiring the employee to consent, in writing, to the provision of test records to subsequent employers or third parties, are fully consistent with normal medical confidentiality

waiver practices and with the ADA. It would clearly be anomalous to view a medical records confidentiality provision as prohibiting an employee from voluntarily agreeing that a previous employer, or physician, could send a medical record to a current employer or physician.

Appendix D
Certified Laboratories

Appendix D. Certified Laboratories



The FTA's drug rule requires that all drug specimens be analyzed at a Department of Health and Human Services (DHHS) Certified Laboratory. You may use the DHHS-certified laboratory that best meets your needs, regardless of location.

To become certified and listed, a laboratory must undergo three rounds of performance testing plus on-site inspections by DHHS. To maintain the certification, the laboratory must participate in every-other-month performance testing and undergo periodic, on-site inspections.

The DHHS publishes its list of certified drug testing laboratories on a monthly basis in the *Federal Register*. The following is a current listing of those laboratories as of the publication date of this manual. You should consult the *Federal Register* or call the Center for Substance Abuse Prevention at 1-800-843-4971 for the most current list.

The *Federal Register* will be furnished by mail to subscribers for \$375 per year in paper form. Six-month subscriptions are available at one-half the annual rate. The charge for individual copies is \$4.50 for each issue. Documents may be obtained by writing New Orders, Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250-7954. The *Federal Register* is also carried in most college libraries and some public libraries.

DHHS-CERTIFIED LABORATORIES

(As Printed in the *Federal Register*, April 4, 1994)

Alabama

Alabama Reference Laboratories, Inc.
543 South Hull Street
Montgomery, AL 36103
(205) 263-5745

Arizona

Southwest Laboratories
2727 W. Baseline Road, Suite 6
Tempe, AZ 85283
(602) 438-8507

Arkansas

Baptist Medical Center—Toxicology
Laboratory
9601 I-630, Exit 7
Little Rock, AR 72205-7299
(501) 227-2783

California

Centinela Hospital Airport Toxicology
Laboratory
9601 S. Sepulveda Blvd.
Los Angeles, CA 90045
(310) 215-6020

National Health Laboratories, Inc.
5601 Oberlin Drive, Suite 100
San Diego, CA 92121
(619) 455-1221

National Toxicology Laboratories, Inc.
1100 California Avenue
Bakersfield, CA 93304
(805) 322-4250

Nichols Institute Substance Abuse Testing
7470-A Mission Valley Road
San Diego, CA 92108-4406
(619) 686-3200

PharmChem Laboratories, Inc.
1505-A O'Brien Drive
Menlo Park, CA 94025
(415) 328-6200

Poisonlab, Inc.
7272 Clairemont Mesa Road
San Diego, CA 92111
(619) 279-2600

SmithKline Beecham Clinical Laboratories
7600 Tyrone Avenue
Van Nuys, CA 91045
(818) 376-2520

TOXWORX Laboratories, Inc.
6160 Variel Avenue
Woodland Hills, CA 91367
(818) 226-4373

UNILAB
18408 Oxnard Street
Tarzana, CA 91356
(818) 343-8191

Florida

Cedars Medical Center
Department of Pathology
1400 Northwest 12th Avenue
Miami, FL 33136
(305) 325-5810

Eagle Forensic Laboratory, Inc.
950 North Federal Highway, Suite 308
Pompano Beach, FL 33062
(305) 946-4324

SmithKline Beecham Clinical Laboratories
801 East Dixie Avenue
Leesburg, FL 32748
(904) 787-9006

Toxicology Testing Service, Inc.
5426 N.W. 79th Avenue
Miami, FL 33166
(305) 593-2260

Georgia

Doctors Laboratory, Inc.
P.O. Box 2658
2906 Julia Drive
Valdosta, GA 31604
(912) 244-4468

SmithKline Beecham Clinical Laboratories
3175 Presidential Drive
Atlanta, GA 30340
(404) 934-9025

Illinois

Department of the Navy
Navy Drug Screening Laboratory
Building 38-H
Great Lakes, IL 60088-5223
(708) 688-2045

Methodist Medical Center Toxicology
Laboratory
221 N.E. Glen Oak Avenue
Peoria, IL 61636
(309) 671-5199

MetPath, Inc.
1355 Mittel Boulevard
Wood Dale, IL 60191
(708) 595-3888

SmithKline Beecham Clinical Laboratories
506 E. State Parkway
Schaumburg, IL 60173
(708) 885-2010

Indiana

Methodist Hospital of Indiana, Inc.
Department of Pathology and Laboratory
Medicine
1701 N. Senate Boulevard
Indianapolis, IN 46202
(317) 929-3587

South Bend Medical Foundation, Inc.
530 N. Lafayette Boulevard
South Bend, IN 46601
(219) 234-4176

Kansas

Clinical Reference Lab
11850 West 85th Street
Lenexa, KS 66214
(800) 445-6917

Physicians Reference Laboratory
7800 West 110th Street
Overland Park, KS 66210
(913) 338-4070

Louisiana

Laboratory Specialists, Inc.
113 Jarrell Drive
Belle Chasse, LA 70037
(504) 392-7961

Occupational Toxicology Laboratories, Inc.
2002 20th Street, Suite 204A
Kenner, LA 70062
(504) 465-0751

Maryland

National Center for Forensic Science
1901 Sulphur Spring Road
Baltimore, MD 21227
(410) 536-1485

Massachusetts

Bioran Medical Laboratory
415 Massachusetts Avenue
Cambridge, MA 02139
(617) 547-8900

Michigan

Health Care/MetPath
24451 Telegraph Road
Southfield, MI 48034
(800) 328-4142 (Inside Michigan)
(800) 225-9414 (Outside Michigan)

Minnesota

MedTox Laboratories, Inc.
402 W. Country Road D
St. Paul, MN 55112
(612) 636-7466

Mississippi

ElSohly Laboratories, Inc.
5 Industrial Park Drive
Oxford, MS 38655
(601) 236-2609

Puckett Laboratory
4200 Mamie Street
Hattiesburg, MS 39402
(601) 264-3856

Roche Biomedical Laboratories, Inc.
1120 Stateline Road
Southaven, MS 38671
(601) 342-1286

Missouri

Cox Medical Centers
Department of Toxicology
1423 North Jefferson Avenue
Springfield, MO 65802
(417) 836-3093

Metropolitan Reference Laboratories, Inc.
2320 Schuetz Road
St. Louis, MO 63146
(800) 288-7293

SmithKline Beecham Clinical Laboratories
11636 Administration Drive
St. Louis, MO 63146
(314) 567-3905

St. Louis University
Forensic Toxicology Laboratory
1205 Carr Lane
St. Louis, MO 63104
(314) 577-8628

Toxicology & Drug Monitoring Laboratory
University of Missouri
Hospital & Clinics
301 Business Loop 70 West, Suite 208
Columbia, MO 65203
(314) 882-1273

Nebraska

Saint Joseph Hospital
Toxicology Laboratory
601 N. 30th Street
Omaha, NE 68131-2197
(402) 449-4940

Nevada

Associated Pathologists Laboratories Inc.
4230 South Burnham Avenue, Suite 250
Las Vegas, NV 89119-5412
(702) 733-7866

Sierra Nevada Laboratories, Inc.
888 Willow Street
Reno, NV 89502
(800) 648-5472

New Jersey

MetPath, Inc.
One Malcolm Avenue
Teterboro, NJ 07608
(201) 393-5000

National Health Laboratories Inc.
75 Rod Smith Place
Cranford, NJ 07016-2843
(908) 272-2511

PDLA, Inc. (Princeton)
100 Corporate Court
So. Plainfield, NJ 07080
(908) 769-8500

Roche Biomedical Laboratories, Inc.
69 First Avenue
Raritan, NJ 08869
(800) 437-4986

New Mexico

S.E.D. Medical Laboratories
500 Walter NE, Suite 500
Albuquerque, NM 87102
(505) 848-8800

North Carolina

CompuChem Laboratories
Special Division
3308 Chapel Hill/Nelson Hwy.
Research Triangle Park, NC 27709
(919) 549-8263

CompuChem Laboratories, Inc.
A Subsidiary of Roche Biomedical
Laboratory
3308 Chapel Hill/Nelson Highway
Research Triangle Park, NC 27709
(919) 549-8263

National Health Laboratories Inc.
2540 Empire Drive
Winston-Salem, NC 27103-6710
(800) 334-8627 (outside NC)
(800) 642-0894 (inside NC)

Ohio

CPF MetPath Laboratories
21007 Southgate Park Boulevard
Cleveland, OH 44137-3054
(800) 338-0166 (Outside Ohio)
(800) 362-8913 (Inside Ohio)

Jewish Hospital of Cincinnati, Inc.
3200 Burnett Avenue
Cincinnati, OH 45229
(513) 569-2051

Medical College Hospitals Toxicology
Laboratory
Department of Pathology
3000 Arlington Avenue
Toledo, OH 43699-0008
(419) 381-5213

Oklahoma

National Drug Assessment Corporation
5419 South Western
Oklahoma City, OK 73109
(800) 749-3784

St. Anthony Hospital
(Toxicology Laboratory)
P.O. Box 205
1000 N. Lee Street
Oklahoma City, OK 73102
(405) 272-7052

Oregon

Oregon Medical Laboratories
P.O. Box 972
722 East 11th Avenue
Eugene, OR 97440-0972
(503) 687-2134

Pennsylvania

DrugScan Inc.
P.O. Box 2969
1119 Mearns Road
Warminster, PA 18974
(215) 674-9310

Med-Chek/Damon
4900 Perry Highway
Pittsburgh, PA 15229
(412) 931-7200

SmithKline Beecham Clinical Laboratories
400 Egypt Road
Norristown, PA 19403
(800) 523-5447

Tennessee

Aegis Analytical Laboratories, Inc.
624 Grassmere Park Road, Suite 21
Nashville, TN 37211
(615) 331-5300

MedExpress/National Laboratory Center
4022 Willow Lake Boulevard
Memphis, TN 38175
(901) 795-1515

National Health Laboratories Inc.
d.b.a. National Reference Laboratory
Substance Abuse Division
1400 Donelson Pike, Suite A-15
Nashville, TN 37217
(615) 360-3992

National Psychopharmacology Laboratory,
Inc.
9320 Park W. Boulevard
Knoxville, TN 37923
(800) 251-9424

Texas

Allied Clinical Laboratories
201 Plaza Boulevard
Hurst, TX 76053
(817) 282-2257

Damon/MetPath
8300 Estes Blvd., Suite 900
Irving, TX 75063
(214) 929-0535

Drug Labs of Texas
15201 I-10 East, Suite 125
Channelview, TX 77530
(713) 457-3784

Harrison Laboratories, Inc.
9930 West Highway 80
Midland, TX 79706
(915) 563-3300

Hermann Hospital Toxicology Laboratory
Hermann Professional Building
6410 Fannin, Suite 354
Houston, TX 77030
(713) 793-6080

PharmChem Laboratories, Inc.
Texas Division
7606 Pebble Drive
Fort Worth, TX 76118
(817) 595-0294

Precision Analytical Laboratories, Inc.
13300 Blanco Road, Suite 150
San Antonio, TX 78216
(210) 493-3211

Scott & White Drug Testing Laboratory
600 S. 25th Street
Temple, TX 76504
(800) 749-3788

SmithKline Beecham Clinical Laboratories
8000 Sovereign Row
Dallas, TX 75247
(214) 638-1301

Utah

Associated Regional and University
Pathologists, Inc.
500 Chipeta Way
Salt Lake City, UT 84108
(801) 583-2787

Northwest Toxicology, Inc.
1141 E. 3900 South
Salt Lake City, UT 84124
(800) 322-3361

Virginia

American Medical Laboratories, Inc.
14225 Newbrook Drive
Chantilly, VA 22021
(703) 802-6900

Department of the Navy
Navy Drug Screening Laboratory
1321 Gilbert Street
Norfolk, VA 23511-2597
(804) 444-8089, Ext. 317

National Health Laboratories Inc.
13900 Park Center Road
Herndon, VA 22071
(703) 742-3100

Washington

Laboratory of Pathology of Seattle, Inc.
1229 Madison Street, Suite 500
Nordstrom Medical Tower
Seattle, WA 98104
(206) 386-2672

Pathology Associates Medical Laboratories
East 11604 Indiana
Spokane, WA 99206
(509) 926-2400

Regional Toxicology Services
15305 N.E. 40th Street
Redmond, WA 98052
(206) 882-3400

Wisconsin

Bayshore Clinical Laboratory
4555 W. Schroeder Drive
Brown Deer, WI 53223
(414) 355-4444

Employee Health Assurance Group
405 Alderson Street
Schofield, WI 54476
(800) 627-8200

General Medical Laboratories
36 South Brooks Street
Madison, WI 53715
(608) 267-6267

Marshfield Laboratories
1000 North Oak Avenue
Marshfield, WI 54449
(715) 389-3734

Medical Science Laboratories
11020 W. Plank Court
Wauwatosa, WI 53226
(414) 476-3400

Appendix E

Conforming Products List

of

Evidential Breath Measurement Devices

after January 31, 1990, unless NHTSA has determined that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under section 114 (of the Act), and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily modified to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility determinations may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the Federal Register of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA determines, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this determination in the Federal Register.

Champagne Imports, Inc. of Landsdale, Pennsylvania (Registered Importer No. R-90-009), has petitioned NHTSA to determine whether 1969 Volkswagen 119 "Beetle" passenger cars are eligible for importation into the United States. The vehicle which Champagne believes is substantially similar is the 1969 Volkswagen 119 "Beetle" that was manufactured for importation into and sale in the United States and certified by its manufacturer, Volkswagenwerk A.G., as conforming to all applicable Federal motor vehicle safety standards.

The petitioner stated that it carefully compared the non-U.S. certified version of the 1969 Volkswagen 119 "Beetle" to its U.S. certified counterpart, and found that the two vehicles are substantially similar with respect to compliance with most applicable Federal motor vehicle safety standards.

Champagne submitted information with its petition intended to demonstrate that the non-U.S. certified 1969 Volkswagen 119 "Beetle", as originally manufactured, conforms to many Federal motor vehicle safety standards in the same manner as its U.S. certified counterpart, or is capable of being readily modified to conform to those standards.

Specifically, the petitioner claims that the non-U.S. certified 1969 Volkswagen 119 "Beetle" is identical to its U.S. certified counterpart with respect to compliance with Standard Nos. 101 *Controls and Displays*, 102 *Transmission Shift Lever Sequence*, * * *, 103 *Defrosting and Defogging*

Systems, 104 *Windshield Wiping and Washing Systems*, 105 *Hydraulic Brake Systems*, 106 *Brake Hoses*, 107 *Reflecting Surfaces*, 109 *New Pneumatic Tires*, 111 *Rearview Mirrors*, 113 *Hood Latch Systems*, 116 *Brake Fluid*, 124 *Accelerator Control Systems*, 201 *Occupant Protection in Interior Impact*, 202 *Head Restraints*, 203 *Impact Protection for the Driver From the Steering Control System*, 204 *Steering Control Rearward Displacement*, 205 *Glazing Materials*, 206 *Door Locks and Door Retention Components*, 207 *Seating Systems*, 209 *Seat Belt Assemblies*, 210 *Seat Belt Assembly Anchorages*, 211 *Wheel Nuts, Wheel Discs and Hubcaps*, and 212 *Windshield Mounting*.

Petitioner also contends that the non-U.S. certified Volkswagen 119 "Beetle" is capable of being readily modified to meet the following standards, in the manner indicated:

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment*: (a) Installation of U.S.-model headlamp assemblies which incorporate sealed beam headlamps and front sidemarkers; (b) installation of U.S.-model taillamp assemblies which incorporate rear sidemarkers.

Standard No. 110 *Tire Selection and Rims*: installation of a tire information placard.

Standard No. 115 *Vehicle Identification Number*: installation of a VIN plate that can be read from outside the left windshield pillar, and a VIN reference label on the edge of the door or latch post nearest the driver.

Standard No. 208 *Occupant Crash Protection*: (a) Installation of either a U.S.-model seat belt in the driver's position or a belt webbing-actuated microswitch in the driver's seat belt retractor to activate the seat belt warning system; (b) installation of an ignition switch-actuated seat belt warning lamp and buzzer.

Standard No. 301 *Fuel System Integrity*: installation of a rollover valve in the fuel tank vent line between the fuel tank and the evaporative emissions collection canister.

Interested persons are invited to submit comments on the petition described above. Comments should refer to the docket number and be submitted to: Docket Section, National Highway Traffic Safety Administration, room 5109, 400 Seventh Street, SW., Washington, DC 20590. It is requested but not required that 10 copies be submitted.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the

docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the Federal Register pursuant to the authority indicated below.

Authority: 15 U.S.C. 1397(c)(3) (A)(i)(I) and (C)(ii); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: September 10, 1993.

William A. Boehly,

Associate Administrator for Enforcement
[FR Doc. 93-22799 Filed 9-16-93; 8:45 am]
BILLING CODE 4910-22-M

Highway Safety Programs; Model Specifications for Devices to Measure Breath Alcohol

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice.

SUMMARY: This notice amends the Model Specifications for evidential breath testing devices published in 1984 and updates the list of conforming products. Recent trends indicate that the states are lowering the alcohol levels that indicate drunk driving (e.g., "zero tolerance" laws for underage offenders). Moreover, these specifications address comments received in response to a Department of Transportation Notice of Proposed Rulemaking published in the Federal Register on December 15, 1992 (57 FR 59382). The Model Specifications and the Conforming Products List set forth below reflect new lower evaluation thresholds for devices to measure breath alcohol, to better reflect the range of critical measurements during actual use.

DATES: This notice becomes effective October 18, 1993.

FOR FURTHER INFORMATION CONTACT: Ms. Robin Mayer, Office of Alcohol and State Programs, NTS-21, National Highway Traffic Safety Administrator, 400 Seventh Street, SW., Washington, DC 20590. Telephone (202) 366-9825.

SUPPLEMENTARY INFORMATION: On December 14, 1984 (49 FR 48854), the National Highway Traffic Safety Administration (NHTSA) issued a notice converting the mandatory standards for breath alcohol test devices (38 FR 30459) to Model Specifications for such devices. The Notice indicated that the Agency would continue to test evidential breath testers (EBTs) and would release its findings to provide States which choose not to conduct their own testing with adequate information upon which to base their purchasing decisions.

Since publication of the Model Specifications in 1984 (49 FR 48855), States have been moving toward a lowering of alcohol levels which indicate drunk driving and enacting new laws targeting youthful offenders (i.e., "zero tolerance" laws).

On December 15, 1992, the U.S. Department of Transportation (DOT) published Notices of Proposed Rulemaking (NPRMs) proposing rules to implement the "Omnibus Transportation Employee Testing Act of 1991," which requires alcohol testing programs in aviation, motor carrier, rail, and mass transit industries in the interest of public safety. The Research and Special Programs Administration (RSPA) has proposed similar regulations for the pipeline industry. In general, the proposed rules would prohibit covered employees from performing safety-sensitive functions when test results indicate a breath alcohol concentration (BAC) of 0.04 or greater. Slightly different consequences would apply with respect to an employee having a BAC of 0.02 or greater but less than 0.04. If the NPRMs are adopted as final rules, transportation workers in safety-sensitive positions will be tested at lower alcohol (commercial motor vehicle drivers are already subject to DWI standards at ≥ 0.04).

DOT received comments in response to the rulemaking actions recommending that if NHTSA's Model Specifications are to be used for the transportation workplace alcohol testing programs, then the Model Specifications should be consistent with the requirements of the rules.

In light of the trend toward lowering alcohol levels and to address the comments received in response to DOT's NPRMs, NHTSA has decided to revise its Model Specifications by lowering the BACs at which instruments are evaluated.

Under the earlier specifications, EBTs were evaluated for precision and accuracy at 0.000, 0.050, 0.101, and 0.151 BAC, and tests for operation of the devices at various conditions of operation were performed at 0.101 BAC. The Specifications below establish evaluations for precision and accuracy at 0.000, 0.020, 0.040, 0.080, and 0.160 BAC, and evaluations at various conditions of operation at 0.080. Tests for acetone interference will also be conducted at 0.020 BAC. NHTSA is also expanding its definition of alcohol to better reflect State laws and the capabilities of testing devices.

These revisions will assist the States and local communities by providing a centralized qualification test program for breath-testing devices designed to

collect evidence in law enforcement programs. The Model Specifications are not intended to replace the current qualification programs required in certain States for this equipment or to directly regulate the manufacture of EBTs. However, some States may wish to make use of this program in addition to setting their own requirements. While the agency is not imposing these Model Specifications on State and local governments, NHTSA encourages each State to consider adopting them.

Procedures

Testing of EBTs submitted by manufacturers to these Model Specifications will continue to be conducted by the DOT Volpe National Transportation Systems Center (VNTSC). Procedures for submitting instruments for evaluation have not changed. Tests will continue to be conducted semi-annually or as necessary. Manufacturers wishing to submit EBTs for testing must apply to NHTSA for a test date (Office of Alcohol and State Programs (OASP), NTS-21, NHTSA, 400 Seventh Street SW., Washington, DC 20590). Normally, at least 30 days will be required from the date of notification until the test can be scheduled. One week prior to the scheduled initiation of the test program, the manufacturer will deliver the device to be tested to VNTSC, DTS 75, Kendall Square, Cambridge MA 02142. The manufacturer shall be responsible for ensuring that its device is operating properly and is in proper calibration. If the manufacturer wishes to submit a duplicate, backup instrument, it may do so. The Operator's Manual and the Maintenance Manual will be delivered with the EBT, to VNTSC, with specifications and drawings which fully describe the device. Proprietary information will be respected. (See 49 CFR part 512, regarding the procedure by which NHTSA will consider claims of confidentiality.)

The manufacturer will have the right to check the EBT between arrival in Cambridge and the start of the test and to ensure that the EBT is in proper calibration, but will have no access to it during the tests. Any malfunction of the EBT which results in failure to complete any of the tests satisfactorily will result in a finding that it does not conform to the Model Specifications. If the EBT fails to conform, it may be resubmitted for testing.

On the basis of these results, NHTSA will continue to periodically publish a Conforming Products List (CPL), identifying the EBTs that meet the performance criteria set forth in these Model Specifications.

In anticipation of the publication of this notice and DOT's final rules to implement the Omnibus Transportation Employee Testing Act of 1991, NHTSA invited manufacturers currently known to produce EBTs to submit their instruments for evaluation utilizing these amended specifications. Instruments provided by the manufacturers have been evaluated under these Model Specifications, and this notice includes, as Appendix A, a revised CPL. This CPL identifies those instruments found to conform with the Model Specifications, as amended by this notice. It also identifies those instruments that meet the Model Specifications detailed in 49 FR 48854 (December 14, 1984).

Retesting of instruments will continue to be conducted when necessary. NHTSA intends to modify and improve these Model Specifications as new data and improved test procedures become available. (The test procedures may be altered in specific instances, if necessary, to meet unique design features of an EBT.) If these Model Specifications are modified, notification will be provided in the **Federal Register**. If NHTSA determines that retesting to the modified specification is necessary, a manufacturer whose equipment is listed on the CPL will be notified to resubmit the equipment for testing to the modified specification only. Also, if at any time a manufacturer wishes to change the design of an EBT currently on the CPL, the manufacturer shall submit the proposed changes to OASP for review. Based on this review, a determination will be made regarding whether retesting is required. Guidance to manufacturers on considerations governing this decision is given in Appendix B.

OASP will continue to be the point of contact for information about acceptance testing and field performance of equipment already on the list. When it is available, NHTSA requests that the State and local agencies provide both acceptance and field performance data to OASP. Information from users will be used to: (1) Help NHTSA determine whether EBTs continue to perform according to the NHTSA Model Specifications and (2) ensure that field use does not indicate excessive breakdown or maintenance problems.

If information gathered indicates that an instrument on the CPL is not performing in accordance with the Model Specifications, NHTSA will direct VNTSC to conduct a special investigation. This study may include visits to users and additional tests of the instrument obtained from the open

market. If the investigation indicates that the instruments actually sold on the market are not meeting the Model Specifications, then the manufacturers will be notified that the instrument may be dropped from the list. In this event the manufacturer shall have 30 days from the date of notification to reply. Based on the VNTSC investigation and any data provided by the manufacturer, NHTSA will decide whether the instrument should remain on the list. Upon resubmission, the manufacturer must submit a statement describing what has been done to overcome the problems which led to the dropping of the instrument in question from the list.

This notice addresses comments received by DOT in response to its NPRMs on The Omnibus Transportation Employee Testing Act of 1991 published in the *Federal Register* on December 15, 1992. The changes to the Model Specifications for evidential breath testers contained in this notice become effective on the date noted above. If any person believes NHTSA should reconsider the changes made in this notice, that person may submit a petition for reconsideration. The petition shall be submitted to the Administrator, National Highway Traffic Safety Administration, 400 7th Street, SW., Washington, DC 20590. It is requested, but not required, that 10 copies be submitted. The petition must be received by the date noted above and contain a brief statement of the basis for the petition. The statement may not exceed 15 pages in length, but necessary attachments may be appended to the submission without regard to the 15 page limit. The filing of a petition will not stay the effective date of this notice.

In accordance with the foregoing, the Model Specifications for performance testing of EBTs are set forth below.

Authority: 23 U.S.C. 402, 403, 408, 410; delegations of authority at 49 CFR 1.50 and 501.

Michael B. Brownlee,
Associate Administrator for TSP.

Model Specifications for Evidential Breath Testers

1. Purpose and Scope

These specifications establish performance criteria and methods for testing of evidential breath testers (EBTs). EBTs measure the alcohol content of deep lung breath samples with sufficient accuracy for evidential purposes. These specifications are intended primarily for use in the conformance testing of EBTs.

2. Classification

2.1 Mobility

2.1.1 Mobile Evidential Breath Testers
EBTs that are designed to be transported to non-fixed operational sites in the field.

2.1.2 Nonmobile Evidential Breath Testers

EBTs that are designed to be operated at a fixed location.

2.2 Power Source

2.2.1 Battery Powered Evidential Breath Testers

EBTs that are powered by batteries.

2.2.2 AC Powered Evidential Breath Testers

EBTs that are powered from the AC power lines.

3. Definitions

3.1 Alcohol—The intoxicating agent in beverage alcohol, ethyl alcohol or other low molecular weight alcohols including methyl or isopropyl alcohol.

3.2 BAC, BrAC—Blood alcohol concentration: grams of alcohol per 100 milliliters blood or grams of alcohol per 210 liters of breath in accordance with the Uniform Vehicle Code, Section 11-903(a)(5).¹ BrAC is often used to indicate that the measurement is a breath measurement. In these Model Specifications, concentration units of test samples are referred to as BAC units and are grams of alcohol per 210 liters of air.

3.3 Conformance Tests

Tests performed to check the compliance of a product with these specifications.

3.4 Standard Deviation

An indication of measurement precision of the EBT in a test, expressed as follows:

Standard deviation = $[\text{Sum } (X_i - X_m)^2 / (N - 1)]^{1/2}$
where X_i = a single measurement result
 X_m = the average of the measurements
 N = the number of measurements made in the test.

3.5 Systematic Error

An indication of the accuracy of the EBT in a test.

Systematic error = $(X_m - \text{test BAC}) / \text{test BAC}$
100

3.6 Calibrating Unit (CU)

A device that produces an alcohol-in-air test sample of known concentration that meets the Model Specifications for Calibrating Units (49 FR 48865).

3.7 BASS

Breath Alcohol Sample Simulator. A device which provides an alcohol-in-air

test sample with known and adjustable alcohol concentration profile, flow rate, and air composition at 34° centigrade. (See NBS Special Publication 480-41, July 1981² for a description of a BASS unit suitable for use in Test 4.)

4. Test Methods and Requirements

Each of the tests below requires 10 measurements to three decimal places made at 0.080 BAC or other specified BAC using the ETB being evaluated. Procedures specified by the manufacturer will be followed. Unless otherwise specified, the tests will be performed in the absence of drafts and at prevailing normal laboratory temperature, humidity, and barometric pressure. Ethyl alcohol will be used to prepare the test samples in this Model Specifications. A CU of the type which uses aqueous alcohol solutions thermostated at 34° C and a ratio of headspace concentration to liquid concentration of 0.000393 (see 49 FR 48865) will be used to provide the BAC samples. The CU shall be capable of delivering 10 complete vapor samples with alcohol depletion of not more than 1%. Human breath will be used to drive the CU. (For Test 4, the BASS device will be used.) Performance requirements are indicated in square brackets. [SE=systematic error, SD=standard deviation].

4.1 Test 1 Precision and Accuracy.

Test at each specified BAC.

Test 1.1: 0.020 BAC [SE ≤ ±0.005 BAC; SD ≤ 0.0042]

Test 1.2: 0.040 BAC [SE ≤ ±0.005 BAC; SD ≤ 0.0042]

Test 1.3: 0.080 BAC [SE ≤ ±0.005 BAC; SD ≤ 0.0042]

Test 1.4: 0.160 BAC [SE ≤ ±0.008 BAC; SD ≤ 0.0042]

The following test is information for potential users only.

There is no performance requirement.

Test 1.5: 0.300 BAC.

4.2 Test 2. Acetone Interference.

Test at 0.020 BAC with the specified amount of acetone added to the CU solution.³ Replace the solution if acetone depletion is indicated during the test. [SE ≤ ±0.005 BAC; SD ≤ 0.0042]

Test 2.1: 70 microliters acetone per 500 ml solution.

Test 2.2: 115 microliters acetone per 500 ml solution.

4.3 Test 3. Blank Reading.

² Available from Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

³ The amounts of acetone have been specified on the basis of an experimentally determined water to air partition factor of 365 to 1 at 34° C to yield a sample of acetone in air at concentrations of 0.3 mg/l and 0.5 mg/l.

¹ Available from National Committee on Uniform Traffic Laws and Ordinances, 405 Church Street, Evanston, IL 60201.

Test at 0.000 BAC. The tester shall use his or her own breath for this test and he or she may not consume alcohol for a period of 48 hours prior to this test or smoke for a period of 20 minutes prior to this test. The tester shall verify that the volume of each breath sample delivered is at least two liters. [SE \leq ± 0.005 BAC with no single result greater than 0.005 BAC].

4.4 Test 4. Breath Sampling (Alternate test in Appendix C may be used).

Prepare the BASS solutions so that the BAC of each of the three segments of the simulated breath sample increases from 0.048, to 0.072, to 0.080. Use compressed breathing air to drive the samples. If the EBT is sensitive to carbon dioxide at concentrations found in human breath (5%), the driver gas will contain this gas at that concentration. Use a spirometer to measure sample volumes and, if necessary, place the EBT in a glove box to make that measurement. Perform three tests at each of the following volume-time combinations [SE \leq ± 0.005 BAC; SD ≤ 0.0042]

	Volume of each segment (liters)	Time of each segment (seconds)
Test 4.1	0.67	3.3
Test 4.2	0.67	2
Test 4.3	2	4

4.5 Test 5. Input Power.

If the EBT is powered by nominal voltages of 120 volts AC or 12 volts DC, condition the device for one half hour at the appropriate input voltage specified below, then test at that voltage. Monitor the input power with a voltmeter accurate to $\pm 2\%$ of full scale in the range used and readjust the voltage, if necessary. [SE \leq ± 0.005 BAC; SD ≤ 0.0042]

Test 5.1: 108 VAC

Test 5.2: 123 VAC

Test 5.3: 11 VDC

Test 5.4: 15 VDC.

4.6 Test 6. Ambient Temperature.

Use a temperature chamber controllable to $\pm 1^\circ\text{C}$. Soak the EBT at the specified temperature for 1 hour before each test, then test at that temperature [SE \leq ± 0.005 BAC; SD ≤ 0.0042].

Test 6.1: 20°C

Test 6.2: 30°C

The following portion of Test 6 is applicable to hand held EBTs and is for information to potential users only. Soak hand-held EBT at specified temperature for one hour before each test, then test at that temperature. Operate the CU outside of the

temperature chamber, if necessary, to ensure that it remains at normal operating temperature. There is no performance requirement.

Test 6.3: 10°C

Test 6.4: 35°C

4.7 Test 7. Vibration Stability.

Use a programmable shake table with sufficient power to drive the weight of the EBT to be tested. Through each of its three major axes, subject the EBT to simple harmonic motion of the specified amplitude and frequency. Sweep through each frequency range in 2.5 minutes, then reverse sweep to the starting frequency in 2.5 minutes. After vibration, test the EBT. [SE \leq ± 0.005 BAC; SD ≤ 0.0042]

Frequency range (Hertz)	Amplitude (inches, peak to peak)
10 to 30030
30 to 60015

4.8 Test 8.

Electrical Safety Inspection. Examine the EBT for protection of the operator and person being tested from electrical shock. Examine for proper use of input power fuses, and verify that there are no exposed male connectors or conducting surfaces at high potential. Determine that overheating does not occur during operation and that fire hazards do not exist.

APPENDIX A—CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES

Manufacturer and model	Mobile	Nonmobile
Alcohol Counter-measures System, Inc., Port Huron, MI:		
Alert J3AD*	X	X
BAC Systems, Inc., Ontario, Canada:		
Breath Analysis Computer*		X
CAMEC Ltd., North Shields, Tyne and Ware, England:		
IR Breath Analyzer*	X	X
CMI, Inc., Owensboro, KY:		
Intoxilyzer Model:		
200	X	X
1400	X	X
4011*	X	X
4011A*	X	X
4011AS*	X	X
4011AS-A*	X	X
4011AS-AQ*	X	X
4011 AW*	X	X
4011A27-10100*	X	X
4011A27-10100 with filter*	X	X

APPENDIX A—CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES—Continued

Manufacturer and model	Mobile	Nonmobile
5000*	X	X
5000 (w/Cal. Vapor Re-Circ.)*	X	X
5000 (w/3/8" ID Hose option)*	X	X
5000CD	X	X
5000 (CAL DOJ)*	X	X
5000VA	X	X
PAC 1200*	X	X
S-D2*	X	X
Decator Electronics, Decator, IL:		
Alco-Tector model 500*		X
Intoximeters, Inc., St. Louis, MO:		
Photo Electric Intoximeter*		X
GC Intoximeter MK II*	X	X
GC Intoximeter MK IV*	X	X
Auto Intoximeter*	X	X
Intoximeter Model:		
3000*	X	X
3000 (rev B1)*	X	X
3000 (rev B2)*	X	X
3000 (rev B2A)*	X	X
3000 (rev B2A) w/ FM option*	X	X
3000 (Fuel Cell)*	X	X
3000 D*	X	X
3000 DFC*	X	X
Alcomonitor 1		X
Alco-Sensor III	X	X
Alco-Sensor IV	X	X
RBT III	X	X
BRT III-A	X	X
RBT IV	X	X
Komyo Kitagawa, Kogyo, K.K.:		
Alcolyzer DPA-2*	X	X
Breath Alcohol Meter PAM 101B*	X	X
Life-Loc, Inc., Wheat Ridge, CO:		
PBA 3000-P*	X	X
Lion Laboratories, Ltd., Cardiff, Wales, UK:		
Alcolmeter Model:		
AE-D1*	X	X
SD-2*	X	X
EBA*	X	X
Auto-Alcolmeter*		X
Luckey Laboratories, San Bernadino, CA:		
Alco-Analyzer Model:		
1000*		X
2000*		X
National Draeger, Inc., Pittsburgh, PA:		
Alcotest Model:		
7010*	X	X
7110*	X	X
7410*	X	X
Breathalyzer Model:		
900*	X	X

APPENDIX A—CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES—Continued

Manufacturer and model	Mobile	Nonmobile
900A *	X	X
900BG *	X	X
National Patent Analytical Systems, Inc., Mansfield, OH:		
BAC DataMaster ² ...	X	X
BAC DataMaster-Transportable	X	X
Omicron Systems, Palo Alto, CA:		
Intoxilyzer Model:		
4011 *	X	X
4011AW *	X	X
Plus 4 Engineering, Minturn, CO:		
5000 Plus4 *	X	X
Siemens-Allis, Cherry Hill, NJ:		
Alcomat *	X	X
Alcomat F *	X	X
Smith and Wesson Electronics, Springfield, MA:		
Breathalyzer Model:		
900 *	X	X
900A *	X	X
1000 *	X	X
2000 *	X	X
2000 (non-Humidity Sensor) *	X	X
Stephenson Corp.: Breathalyzer 900 * ...	X	X
U.S. Alcohol Testing, Inc./Protection Devices, Inc., Rancho Cucamonga, CA:		
Alco-Analyzer 1000		X
Alco-Analyzer 2000		X
Alco-Analyzer 2100	X	X
Verax Systems, Inc., Fairport, NY:		
BAC Verifier *	X	X
BAC Verifier Datamaster *	X	X
BAC Verifier Datamaster II *	X	X

* Instruments marked with an asterisk (*) meet the Model Specifications detailed in 49 FR 48854 (December 14, 1984) (i.e., instruments tested at 0.000, 0.050, 0.101, and 0.151 BAC.) Instruments not marked with an asterisk meet the Model Specifications detailed in this notice (i.e., instruments tested at 0.000, 0.020, 0.040, 0.080, and 0.160 BAC.)

APPENDIX A—CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES—Continued

Manufacturer and model	Mobile	Nonmobile
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¹ During this reporting period, Intoximeters, Inc. provided VNTSC a modified Alcomonitor, the "Alcomonitor CC", for evaluation. In addition to a redesigned cabinet, a function has been added to permit the user to alter program sequencing and printing options via a desk-top computer. Because these modifications do not affect precision or accuracy, and since it is essentially the same as the approved device, the "Alcomonitor CC" does not require a separate listing on the CPL.

² During this reporting period, National Patent Analytical Systems, Inc., provided VNTSC with a BAC DataMaster having an internal keyboard. The addition of a keyboard, whether internal or external, does not affect precision and accuracy and does not require a separate listing on the CPL. Therefore the model designation "BAC DataMaster", for the purposes of the CPL, includes all such instruments, whether or not they have a keyboard.

Appendix B—Guidelines for Re-testing of Modified EBT

Manufacturers contemplating revisions to an EBT which is currently listed on the Conforming Products List (CPL) are advised that the revision may affect the status of the device on the CPL. It may or may not be necessary to retest the revised EBT. The manufacturer should inform NHTSA of the contemplated change so that a judgment can be made. The following lists the type of information NHTSA uses in determining the necessity to retest an instrument, and is provided as guidance to manufacturers:

- Manufacturer and Model Name.
- Nature and reason for change.
- Scope of change (e.g., will existing devices be retrofitted? Will the change apply to some users but not others?).
- Will the change affect performance of the device as regards the Model Specifications? (Precision and accuracy, acetone interference, blank reading, linearity, sampling efficiency, low or high temperature operation, low or high input power operation, mobile operation, electrical safety).
- Will the change alter performance with regard to the possibility of chemical or electrical interference or unusually high relative humidity?
- How will the changes be documented for the benefit of the user? (e.g., will the changes be documented in service bulletins and/or service manuals? If not, why not?).

If necessary for clarity, drawings of the current and changed device may

also be helpful in NHTSA's deliberations.

If, upon review of information provided by a manufacturer, it is determined that re-testing is not warranted, a statement to that effect will be included in the next scheduled CPL update.

Appendix C—Alternate Breath Sampling Test

Select eight human subjects who are in good health. Their oral temperatures prior to the start of testing shall be between 97.0°F and 99.5°F.

Divide the subjects into two groups of four. The target BAC range for group 1 shall be from 0.04 to 0.10. The target BAC range for group 2 shall be from 0.10 to 0.20. In order to obtain a distribution of BACs, each subject shall be given a different amount of alcohol to drink. As a rough guide to dose vs. peak resultant BAC, and based on ingestion of a 100 proof beverage, a body weight of 160 lbs., and a 2 hour drinking period, 3 oz. of beverage should produce a BAC of 0.04; 6 oz. should produce a BAC of 0.10; and 8 oz. should produce a BAC of 0.15.

Blood samples taken shall be either from a vein in the arm or from capillaries in the fingertip. Non-alcoholic swabs shall be used to prepare the skin surface. If fingertip blood is to be taken, a 90-minute waiting period will be observed before beginning breath sample testing and if venous blood is to be taken, a 120-minute period will be observed. No subject may smoke during the 20-minute period before testing begins.

Use the EBT to measure the subject's breath, then take a blood sample, then measure the subject's breath again. Allow no more than five minutes between the taking of the first and second breath sample.

The blood samples shall be analyzed within 72 hours of being taken and at least two alcohol determinations shall be made on each sample. A reference sample of known BAC in the range 0.05 to 0.15 shall be prepared by the analyzing laboratory. Five determinations of the reference sample shall be made concurrently with the analysis of the human subject blood samples. The SD of the reference sample analysis shall not exceed 0.005 BAC and the SE shall not exceed $\pm 5\%$ of the known BAC.

Calculate the average blood result and the average breath result for each subject. Label each average blood result X_i ($i=1$ to 8 for each of the subjects, in ascending order of BAC). For each such result X_i , label the companion average breath result Y_i .

Calculate X_H , the average of the three highest blood results, and X_L , the three lowest. For the three highest blood results, and for the three lowest blood results, calculate the companion averages of the breath results, Y_H and Y_L .

Calculate X_M , the average of the eight blood results, and Y_M , the average of the eight breath results.

On graph paper, plot the points corresponding to (X_M, Y_M) , (X_H, Y_H) , (X_L, Y_L) , and the eight points (X_i, Y_i) .

Draw a straight line, the blood-breath correlation line, through the point (X_M, Y_M) and parallel to the line joining the points (X_L, Y_L) and (X_H, Y_H) .

At $X=0.100$ on the blood-breath correlation line, mark points on the perpendicular at $Y=-0.020$ and another at $Y=+0.020$. Draw a line through each of these points, the negative bias and

positive bias lines, parallel to the blood-breath correlation line. Requirements:

1. The value on the Y axis which corresponds to the point $X=0.100$ shall lie at or between 0.080 and 0.100.
2. At least seven of the eight averaged breath results shall lie within the area between the positive and negative bias lines.

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Appendix F
Fact Sheets

Appendix F. Fact Sheets

Drug Detection Periods

Detection periods vary; rates of metabolism and excretion are different for each drug and use. Detection periods should be viewed as estimates. Cases can always be found to contradict these approximations.

Drug	Detection Period
Amphetamines	
Amphetamine	2-4 days
Methamphetamine	2-4 days
Cocaine	
Benzoyllecgonine	12-72 hours
Cannabinoids (Marijuana)	
Casual Use	2-7 days
Chronic Use	Up to 30 days
Ethanol (Alcohol)	12-24 hours
Opiates	
Codeine	2-4 days
Hydromorphone (Dilaudid)	2-4 days
Morphine (for Heroin)	2-4 days
Phencyclidine (PCP)	
Casual Use	2-7 days
Chronic Use	Up to 30 days

Alcohol Fact Sheet

Alcohol is a socially acceptable drug that has been consumed throughout the world for centuries. It is considered a recreational beverage when consumed in moderation for enjoyment and relaxation during social gatherings. However, when consumed primarily for its physical and mood-altering effects, it is a substance of abuse. As a depressant, it slows down physical responses and progressively impairs mental functions.

Signs and Symptoms of Use

- Dulled mental processes
- Lack of coordination
- Odor of alcohol on breath
- Possible constricted pupils
- Sleepy or stuporous condition
- Slowed reaction rate
- Slurred speech

(Note: Except for the odor, these are general signs and symptoms of any depressant substance.)

Health Effects

The chronic consumption of alcohol (average of three servings per day of beer [12 ounces], whiskey [1 ounce], or wine [6 ounce glass]) over time may result in the following health hazards:

- Decreased sexual functioning
- Dependency (up to 10 percent of all people who drink alcohol become physically and/or mentally dependent on alcohol and can be termed "alcoholic")
- Fatal liver diseases
- Increased cancers of the mouth, tongue, pharynx, esophagus, rectum, breast, and malignant melanoma
- Kidney disease
- Pancreatitis
- Spontaneous abortion and neonatal mortality
- Ulcers
- Birth defects (up to 54 percent of all birth defects are alcohol related).

Social Issues

- Two-thirds of all homicides are committed by people who drink prior to the crime.
- Two to three percent of the driving population is legally drunk at any one time. This rate is doubled at night and on weekends.
- Two-thirds of all Americans will be involved in an alcohol-related vehicle accident during their lifetimes.
- The rate of separation and divorce in families with alcohol dependency problems is 7 times the average.
- Forty percent of family court cases are alcohol problem related.
- Alcoholics are 15 times more likely to commit suicide than are other segments of the population.
- More than 60 percent of burns, 40 percent of falls, 69 percent of boating accidents, and 76 percent of private aircraft accidents are alcohol related.

The Annual Toll

- 24,000 people will die on the highway due to the legally impaired driver.
- 12,000 more will die on the highway due to the alcohol-affected driver.
- 15,800 will die in non-highway accidents.
- 30,000 will die due to alcohol-caused liver disease.
- 10,000 will die due to alcohol-induced brain disease or suicide.
- Up to another 125,000 will die due to alcohol-related conditions or accidents.

Workplace Issues

- It takes one hour for the average person (150 pounds) to process one serving of an alcoholic beverage from the body.
- Impairment in coordination and judgment can be objectively measured with as little as two drinks in the body.
- A person who is legally intoxicated is 6 times more likely to have an accident than a sober person.

Amphetamine Fact Sheet

Amphetamines are central nervous system stimulants that speed up the mind and body. The physical sense of energy at lower doses and the mental exhilaration at higher doses are the reasons for their abuse. Although widely prescribed at one time for weight reduction and mood elevation, the legal use of amphetamines is now limited to a very narrow range of medical conditions. Most amphetamines that are abused are illegally manufactured in foreign countries and smuggled into the U.S. or clandestinely manufactured in crude laboratories.

Description

- Amphetamine is sold in counterfeit capsules or as white, flat, double-scored “mini-bennies.” It is usually taken by mouth.
- Methamphetamine is often sold as a creamy white and granular powder or in lumps and is packaged in aluminum foil wraps or sealable plastic bags. Methamphetamine may be taken orally, injected, or snorted into the nose.
- Trade/street names include Biphphetamine, Delcobese, Desotyn, Detedrine, Chetrol, Ritalin, Speed, Meth, Crank, Crystal, Monster, Black Beauties, and Rits.

Signs and Symptoms of Use

- Hyperexcitability, restlessness
- Dilated pupils
- Increased heart rate and blood pressure
- Heart palpitations and irregular beats
- Profuse sweating
- Rapid respiration
- Confusion
- Panic
- Talkativeness
- Inability to concentrate
- Heightened aggressive behavior.

Health Effects

- Regular use produces strong psychological dependence and increasing tolerance to drug.
- High doses may cause toxic psychosis resembling schizophrenia.
- Intoxication may induce a heart attack or stroke due to spiking of blood pressure.
- Chronic use may cause heart and brain damage due to severe constriction of capillary blood vessels.

- The euphoric stimulation increases impulsive and risk-taking behaviors, including bizarre and violent acts.
- Withdrawal from the drug may result in severe physical and mental depression.

Workplace Issues

- Since amphetamines alleviate the sensation of fatigue, they may be abused to increase alertness because of unusual overtime demands or failure to get rest.
- Low-dose amphetamine use will cause a short-term improvement in mental and physical functioning. With greater use or increasing fatigue, the effect reverses and has an impairing effect. Hangover effect is characterized by physical fatigue and depression, which may make operation of equipment or vehicles dangerous.

Cocaine Fact Sheet

Cocaine is used medically as a local anesthetic. It is abused as a powerful physical and mental stimulant. The entire central nervous system is energized. Muscles are more tense, the heart beats faster and stronger, and the body burns more energy. The brain experiences an exhilaration caused by a large release of neurohormones associated with mood elevation.

Description

- The source of cocaine is the coca bush, grown almost exclusively in the mountainous regions of northern South America.
- Cocaine Hydrochloride—“snorting coke” is a white to creamy granular or lumpy powder that is chopped into a fine powder before use. It is snorted into the nose, rubbed on the gums, or injected in veins. The effect is felt within minutes and lasts 40 to 50 minutes per “line” (about 60 to 90 milligrams). Common paraphernalia include a single-edged razor blade and a small mirror or piece of smooth metal, a half straw or metal tube, and a small screw cap vial or folded paper packet containing the cocaine.
- Cocaine Base—a small crystalline rock about the size of a small pebble. It boils at a low temperature, is not soluble in water, and is up to 90 percent pure. It is heated in a glass pipe and the vapor is inhaled. The effect is felt within seven seconds. Common paraphernalia includes a “crack pipe” (a small glass smoking device for vaporizing the crack crystal) and a lighter, alcohol lamp, or small butane torch for heating.
- Trade/street names include Coke, Rock, Crack, Free Base, Flake, Snow, Smoke, and Blow.

Signs and Symptoms of Use

- Financial problems
- Frequent and extended absences from meetings or work assignment
- Increased physical activity and fatigue
- Isolation and withdrawal from friends and normal activities
- Secretive behaviors, frequent nonbusiness visitors, delivered packages, phone calls
- Unusual defensiveness, anxiety, agitation
- Wide mood swings
- Runny or irritated nose
- Difficulty in concentration
- Dilated pupils and visual impairment
- Restlessness
- Formication (sensation of bugs crawling on skin)
- High blood pressure, heart palpitations, and irregular rhythm
- Hallucinations
- Hyperexcitability and overreaction to stimulus
- Insomnia
- Paranoia and hallucinations
- Profuse sweating and dry mouth
- Talkativeness.

Health Effects

- Research suggests that regular cocaine use may upset the chemical balance of the brain. As a result, it may speed up the aging process by causing irreparable damage to critical nerve cells. The onset of nervous system illnesses such as Parkinson's disease could also occur.
- Cocaine use causes the heart to beat faster and harder and rapidly increases blood pressure. In addition, cocaine causes spasms of blood vessels in the brain and heart. Both effects lead to ruptured vessels causing strokes or heart attacks.
- Strong psychological dependency can occur with one "hit" of crack. Usually, mental dependency occurs within days (crack) or within several months (snorting coke). Cocaine causes the strongest mental dependency of any known drug.
- Treatment success rates are lower than for other chemical dependencies.
- Cocaine is extremely dangerous when taken with depressant drugs. Death due to overdose is rapid. The fatal effects of an overdose are not usually reversible by medical intervention. The number of cocaine overdose deaths has tripled in the last four years.
- Cocaine overdose was the second most common drug emergency in 1986—up from 11th place in 1980.

Workplace Issues

- Extreme mood and energy swings create instability. Sudden noises can cause a violent reaction.
- Lapses in attention and ignoring warning signals greatly increase the potential for accidents.
- The high cost of cocaine frequently leads to workplace theft and/or dealing.
- A developing paranoia and withdrawal create unpredictable and sometimes violent behavior.
- Work performance is characterized by forgetfulness, absenteeism, tardiness, and missed assignments.

Cannabinoids (Marijuana) Fact Sheet

Marijuana is one of the most misunderstood and underestimated drugs of abuse. People use marijuana for the mildly tranquilizing and mood- and perception-altering effects it produces.

Description

- Usually sold in plastic sandwich bags, leaf marijuana will range in color from green to light tan. The leaves are usually dry and broken into small pieces. The seeds are oval with one slightly pointed end. Less prevalent, hashish is a compressed, sometimes tarlike substance ranging in color from pale yellow to black. It is usually sold in small chunks wrapped in aluminum foil. It may also be sold in an oily liquid.
- Marijuana has a distinctly pungent aroma resembling a combination of sweet alfalfa and incense.
- Cigarette papers, roach clip holders, and small pipes made of bone, brass, or glass are commonly found. Smoking “bongs” (large bore pipes for inhaling large volumes of smoke) can easily be made from soft drink cans and toilet paper rolls.
- Trade/street names include Marinol, THC, Pot, Grass, Joint, Reefer, Acapulco Gold, Sinsemilla, Thai Sticks, Hash, and Hash Oil.

Signs and Symptoms of Use

- Reddened eyes (often masked by eyedrops)
- Slowed speech
- Distinctive odor on clothing
- Lackadaisical “I don’t care” attitude
- Chronic fatigue and lack of motivation
- Irritating cough, chronic sore throat.

Health Effects

General

- When marijuana is smoked, it is irritating to the lungs. Chronic smoking causes emphysema-like conditions.
- One joint causes the heart to race and be overworked. People with undiagnosed heart conditions are at risk.
- Marijuana is commonly contaminated with the fungus *Aspergillus*, which can cause serious respiratory tract and sinus infections.
- Marijuana smoking lowers the body’s immune system response, making users more susceptible to infection. The U.S. government is actively researching a possible

connection between marijuana smoking and the activation of AIDS in positive human immunodeficiency virus (HIV) carriers.

Pregnancy Problems and Birth Defects

- The active chemical, tetrahydrocannabinol (THC), and 60 other related chemicals in marijuana concentrate in the ovaries and testes.
- Chronic smoking of marijuana in males causes a decrease in sex hormone, testosterone, and an increase in estrogen, the female sex hormone. The result is a decrease in sperm count, which can lead to temporary sterility. Occasionally, the onset of female sex characteristics including breast development occurs in heavy users.
- Chronic smoking of marijuana in females causes a decrease in fertility and an increase in testosterone.
- Pregnant women who are chronic marijuana smokers have a higher than normal incidence of stillborn births, early termination of pregnancy, and higher infant mortality rate during the first few days of life.
- In test animals, THC causes birth defects, including malformations of the brain, spinal cord, forelimbs, and liver and water on the brain and spine.
- Offspring of test animals who were exposed to marijuana have fewer chromosomes than normal, causing gross birth defects or death of the fetus. Pediatricians and surgeons are concluding that the use of marijuana by either or both parents, especially during pregnancy, leads to specific birth defects of the infant's feet and hands.
- One of the most common effects of prenatal cannabinoid exposure is underweight newborn babies.
- Fetal exposure may decrease visual functioning and causes other ophthalmic problems.

Mental Function

Regular use can cause the following effects:

- Delayed decision-making
- Diminished concentration
- Impaired short-term memory, interfering with learning
- Impaired signal detection (ability to detect a brief flash of light), a risk for users who are operating machinery
- Impaired tracking (the ability to follow a moving object with the eyes) and visual distance measurements

- Erratic cognitive function
- Distortions in time estimation
- Long-term negative effects on mental function known as “acute brain syndrome,” which is characterized by disorders in memory, cognitive function, sleep patterns, and physical condition.

Acute Effects

- Aggressive urges
- Anxiety
- Confusion
- Fearfulness
- Hallucinations
- Heavy sedation
- Immobility
- Mental dependency
- Panic
- Paranoid reaction
- Unpleasant distortions in body image.

Workplace Issues

- The active chemical, THC, stores in body fat and slowly releases over time. Marijuana smoking has a long-term effect on performance.
- A 500 to 800 percent increase in THC concentration in the past several years makes smoking three to five joints a week today equivalent to 15 to 40 joints a week in 1978.
- Combining alcohol or other depressant drugs and marijuana can produce a multiplied effect, increasing the impairing effect of both the depressant and marijuana.

Opiates (Narcotics) Fact Sheet

Opiates (also called narcotics) are drugs that alleviate pain, depress body functions and reactions, and, when taken in large doses, cause a strong euphoric feeling.

Description

- Natural and natural derivatives—opium, morphine, codeine, and heroin
- Synthetics—meperidine (Demerol), oxymorphone (Numorphan), and oxycodone (Percodan)
- May be taken in pill form, smoked, or injected, depending upon the type of narcotic used.
- Trade/street names include Smack, Horse, Emma, Big D, Dollies, Juice, Syrup, and China White.

Signs and Symptoms of Use

- Mood changes
- Impaired mental functioning and alertness
- Constricted pupils
- Depression and apathy
- Impaired coordination
- Physical fatigue and drowsiness
- Nausea, vomiting, and constipation
- Impaired respiration.

Health Effects

- IV needle users have a high risk for contracting hepatitis and AIDS due to the sharing of needles.
- Narcotics increase pain tolerance. As a result, people could more severely injure themselves or fail to seek medical attention after an accident due to the lack of pain sensitivity.
- Narcotics' effects are multiplied when used in combination with other depressant drugs and alcohol, causing increased risk for an overdose.

Social Issues

- There are over 500,000 heroin addicts in the U.S., most of whom are IV needle users.
- An even greater number of medicinal narcotic-dependent persons obtain their narcotics through prescriptions.

- Because of tolerance, there is an ever-increasing need for more narcotic to produce the same effect.
- Strong mental and physical dependency occurs.
- The combination of tolerance and dependency creates an increasing financial burden for the user. Costs for heroin can reach hundreds of dollars a day.

Workplace Issues

- Unwanted side effects such as nausea, vomiting, dizziness, mental clouding, and drowsiness place the legitimate user and abuser at higher risk for an accident.
- Narcotics have a legitimate medical use in alleviating pain. Workplace use may cause impairment of physical and mental functions.

Phencyclidine (PCP) Fact Sheet

Phencyclidine (PCP) was originally developed as an anesthetic, but the adverse side effects prevented its use except as a large animal tranquilizer. Phencyclidine acts as both a depressant and a hallucinogen, and sometimes as a stimulant. It is abused primarily for its variety of mood-altering effects. Low doses produce sedation and euphoric mood changes. The mood can change rapidly from sedation to excitation and agitation. Larger doses may produce a coma-like condition with muscle rigidity and a blank stare with the eyelids half closed. Sudden noises or physical shocks may cause a “freak out” in which the person has abnormal strength, extremely violent behavior, and an inability to speak or comprehend communication.

Description

- PCP is sold as a creamy, granular powder and is often packaged in one-inch square aluminum foil or folded paper “packets.”
- It may be mixed with marijuana or tobacco and smoked. It is sometimes combined with procaine, a local anesthetic, and sold as imitation cocaine.
- Trade/street names include Angel Dust, Dust, and Hog.

Signs and Symptoms of Use

- Impaired coordination
- Severe confusion and agitation
- Extreme mood shifts
- Muscle rigidity
- Nystagmus (jerky eye movements)
- Dilated pupils
- Profuse sweating
- Rapid heartbeat
- Dizziness.

Health Effects

- The potential for accidents and overdose emergencies is high due to the extreme mental effects combined with the anesthetic effect on the body.
- PCP is potentiated by other depressant drugs, including alcohol, increasing the likelihood of an overdose reaction.
- Misdiagnosing the hallucinations as LSD induced, and then treating with Thorazine, can cause a fatal reaction.
- Use can cause irreversible memory loss, personality changes, and thought disorders.
- There are four phases to PCP abuse. The first phase is acute toxicity. It can last up to three days and can include combativeness, catatonia, convulsions, and coma. Distortions of size, shape, and distance perception are common. The second phase, which

does not always follow the first, is a toxic psychosis. Users may experience visual and auditory delusions, paranoia, and agitation. The third phase is a drug-induced schizophrenia that may last a month or longer. The fourth phase is PCP-induced depression. Suicidal tendencies and mental dysfunction can last for months.

Workplace Issues

- PCP abuse is less common today than in recent years. It is also not generally used in a workplace setting because of the severe disorientation that occurs.

Appendix G

Questions and Answers

Appendix G. Questions and Answers

GENERAL ISSUES

Q. How will drug and alcohol testing work in the mass transit industry? How can an employer test employees moving all over a city or traveling to remote sites?

A. The mass transit industry has a great deal of experience in this area, since many employers already have testing programs. Many transit authorities will be able to test employees at central sites (e.g., bus garages, rail terminals or yards). Employers with employees at multiple sites within a metropolitan area may want to refer their employees to one or more established testing sites. Alternatively, they could purchase or hire a mobile van to take the collection site to various locations. This would be particularly useful for testing employees in remote locations. In addition, the rules are designed so that employers can contract with consortia in the vicinity to do the required testing.

Q. The courts overturned FTA's original drug rule. Why do you think this will not happen with the new drug and alcohol rule?

A. The Omnibus Transportation Employee Testing Act of 1991 has given FTA the necessary statutory authority to require its grantees to implement both drug and alcohol testing programs. This act also gives the FTA specific statutory authority to pre-empt inconsistent State or local laws with regard to drug and alcohol testing.

Q. How will the Federal Transit Administration ensure compliance with the regulations?

A. Recipients of Federal funds must certify annually that they are in compliance with these regulations. False certification is a violation of Federal law. Each recipient must submit annual reports summarizing the results of its drug and alcohol testing programs to FTA. Moreover, a full review and evaluation of the performance of grant recipients is conducted every three years under FTA's Triennial Review process. All three processes will be used to determine compliance.

Q. What impact did the New York City rail accident have on these regulations?

A. This unfortunate event demonstrates the need for Federal drug and alcohol testing programs in the transit industry, and undoubtedly helped in the passage of the Omnibus Act. The New York accident lends support to employee testing and supervisory training, which have been included in the FTA rules.

- Q. Who will regulate employees subject to the jurisdiction not only of the FTA but also other modes as well?**
- A. The FTA has resolved jurisdictional issues with other modes having concurrent jurisdiction over transit employees. In general, FTA rules will apply to safety-sensitive employees of its grantees. The details of this deferral mechanism are spelled out in the FTA rules.
- Q. What are the consequences if employers do not comply with the FTA drug and alcohol regulations?**
- A. Compliance with these regulations is a condition of FTA funding. Failure to implement drug and alcohol programs pursuant to the regulations may result in suspension or termination of FTA funding.
- Q. Contract employees are deemed to “stand in the shoes” of covered employees. How does this impact the user-side subsidy programs? Are taxi drivers, dispatchers, and mechanics subject to the FTA rules? Would all taxi drivers in a firm be subject to testing even if only a small part of their business involved a user-side subsidy supported through an FTA program?**
- A. To the extent that a taxi driver does not provide service under an arrangement with an FTA recipient, but is chosen at random by a passenger, it would not be subject to the rules. If, however, the taxicab company or private operator does provide service under an arrangement with an FTA recipient, it is covered by the rule as a contractor, as defined by the rules. In such cases, the taxi company may wish to designate only certain drivers to provide such services, in which case only those designated drivers would be subject to the rules.
- Q. Large operators are defined as those operating primarily in areas over 200,000 population. How would a Section 18 operator be defined if a portion of its operation was provided within urbanized boundaries (i.e., the operator offers service to elderly and disabled within the urbanized boundaries and general public service outside the urbanized boundaries)? How would specialized providers who contract with a large operator for service with the urbanized boundaries (i.e., providing ADA service) be classified – as large operators since they stand in the shoes of a large operator?**
- A. The rule defines a large operator as one operating primarily in an urbanized area 200,000 population and above. Therefore, if a transit provider primarily operates in an area less than 200,000 but has other tangential service in an urbanized area 200,000 or greater, it would be a **small** operator.
- Q. What is FTA’s definition of an accident?**
- A. FTA has defined “accident” to distinguish among different kinds of mass transit vehicles. FTA believes that it is sensible to use a definition of “accident” that is consistent with

FHWA's. The definition states that an accident occurs when a road vehicle (whether a mass transit vehicle or another vehicle, such as a private automobile) suffers disabling damage and is towed away from the scene of the accident. In addition, if other types of vehicles (e.g., rail, vessel) are removed from revenue service as the result of the occurrence, an "accident" is deemed to take place.

Q. How does the FTA determine who is covered by these rules?

- A. The FTA determined that job function rather than job title was critical to transit safety because each transit system uses its own job classification categories. We concluded that five job functions were critical to safety—operating, maintaining, and controlling the movement of a revenue service vehicle, maintaining revenue service equipment, security personnel who carry firearms, and holders of Commercial Drivers' Licenses who operate nonrevenue service vehicles.

Q. Are supervisors also covered by these rules?

- A. Supervisors are included if they perform one of the five designated safety-sensitive functions.

Q. Are volunteers included under these rules?

- A. Yes, they are covered if they perform safety-sensitive functions as defined above.

Q. If a transit operator has contract employees that perform safety-sensitive functions, do they have to be tested?

- A. Yes, except contract mechanics who perform work for Section 18 rural recipients.

Q. Transferees are included under pre-employment testing. When do you test a transfer employee?

- A. When an employee transfers from a nonsafety-sensitive position to a safety-sensitive position, he must be tested prior to the first time he performs a safety-sensitive function.

Q. Can a supervisor use personal observations as a determinant for a reasonable suspicion referral?

- A. Yes, but the supervisor's determination must be made based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odor of the employee. All these determinants are short-term indicators of prohibited drug use or alcohol misuse. Hence, long-term indicators such as absenteeism may not be used as a basis for a reasonable suspicion determination.

Q. After an accident, what is the employer's immediate responsibility under these rules?

A. After a fatal accident, the employer must test the safety-sensitive employee (operator) on duty in the vehicle at the time of the accident. Then the employer must determine whether to test other safety-sensitive employees who may have contributed to the accident. After a nonfatal accident, the employer must determine whether to test safety-sensitive employees on duty in the vehicle at the time of the accident or who may have contributed to the accident. In both fatal and nonfatal accidents, the employer must test the employee within eight (8) hours for alcohol and 32 hours for drugs.

Q. Can an employee leave the scene of an accident before taking a drug or alcohol test?

A. An employee may leave the scene of an accident, without being tested, as long as he remains readily available for testing. That means that the supervisor must know the whereabouts of the employee until he is tested and that the employee is available to be tested immediately after being notified by the employer (within 32 hours of the accident for drug testing and/or 8 hours for alcohol testing).

Q. When must transit operators implement their substance abuse programs under these regulations?

A. Large employers must implement their drug and alcohol testing programs on January 1, 1995, while small employers will have until January 1, 1996, to implement their programs. We further note, in response to several inquiries, that the rule provides no authority for an employer to begin its FTA-mandated program before the implementation dates included in these rules.

Q. Do the rules apply to Indian tribal governments?

A. Yes. As a general matter, statutes apply to Indian nations or tribes unless (1) the law touches exclusive rights of self-governance in purely intramural matters, (2) the application of the law would abrogate rights guaranteed by Indian treaties, or (3) there is proof by legislative history or some other means that Congress intended the law not to apply to Indians on their reservations. In this regard, there is no legislative history indicating congressional intent not to apply the act to Indian tribes. FTA concludes that the act would preempt Indian law.

Q. Can transit operators receive waivers from the requirement of these rules?

A. No. The Omnibus Transportation Employee Testing Act does not give the FTA authority to "waive" any particular requirement of these rules.

Q. Which DOT rule applies to Section 16(b)2 recipients, FTA or FHWA?

A. Employees of Section 16(b)2 recipients are not covered by FTA's rule, but may be covered by FHWA depending on whether the driver of the vehicle is required to have a Commercial Drivers' License (CDL).

Q. Light rail systems that *do not* operate on dedicated tracks are covered by FRA rules. Baltimore, for example, operates its light rail on track connected to the general railroad system. Whose rules apply if an employer has employees covered by more than one DOT modal administration?

A. If a recipient operates a railroad as well as other mass transit services, its railroad operations are subject to FRA's rule while its nonrailroad mass transit operators are subject to the FTA rule.

Q. What about employers that operate ferry vessels that are regulated by the United States Coast Guard (USCG)?

A. The USCG is not mentioned in the act. The USCG has its own authority to take licensing actions or impose penalties for violations of its existing drug and alcohol rules. However, ferry vessel-operating recipients of Section 3, 9, or 18 Federal funds are covered by FTA's drug and alcohol rules. A recipient's safety-sensitive marine employees thus may be subject to licensing actions of the USCG, even though the recipient is regulated by FTA and its employees are covered by FTA's regulations.

RANDOM RATES

Q. How was the random rate for drug testing determined?

A. Because FTA, unlike other DOT agencies, has not previously required drug testing, we do not know the extent of drug use in the mass transit industry. We therefore are using the same random drug testing rate of 50 percent that other DOT agencies have been requiring since 1989.

Q. What is the random testing rate for drugs?

A. The random drug testing rate is set at 50 percent. For compliance purposes, it is important to note that, in calculating its random drug testing results, an employer must include adulterated urine samples and refusals to submit to a test as verified positive drug test results. But this may change in the future. The Department has issued a notice of proposed rulemaking seeking comment on whether we should adopt an industry-wide performance-based random drug testing program.

Q. What is the random testing rate for alcohol?

A. The rule requires employers to randomly test for alcohol at 25 percent. However, the rate may be lowered to 10 percent if the violation rate is less than 0.5 percent per year for two consecutive years. It may also be increased to 50 percent, if the violation rate is equal to or greater than one percent for one year. FTA will publish a notice in the *Federal Register* annually announcing its random alcohol testing rate based on the data collected from the transit industry. The rate is calculated and implemented industry-wide, and not on the basis of any individual employer's rate.

TESTING PROCEDURES

Q. If the employee receives a verified positive drug test result or a breath alcohol test result of 0.04 or greater, is the employee subject to referral to a substance abuse professional (SAP) and/or rehabilitation?

A. Yes, he or she must be referred to the SAP. Depending on the employer's policy, the employee may also be subject to suspension or dismissal.

Q. Will it be possible for an agency to belong to one consortium for alcohol testing and a second consortium for drug testing?

A. Yes. This decision remains with the transit operator. It may be based on any negotiated labor-management agreement, and the operator's budgetary conditions.

Q. Is an employer required to keep an SAP on retainer or can the employer refer an employee to a list of SAPs, but have no formal connection with the SAPs?

A. The relationship an employer has with the substance abuse professional is left up to the employer. Evaluation and rehabilitation may be provided by the employer, (e.g., an EAP program), by an SAP under contract with the employer, or by a substance abuse professional not affiliated with the employer. The choice and assignment of costs will be determined by labor/management agreements and the company's policies.

Q. The rules mandate a minimum of six (6) follow-up tests in the first 12 months following an employee's return to duty. Can these follow-up tests be counted toward the number needed for random testing?

A. No, follow-up testing cannot be counted toward the number needed for random testing.

- Q. The rules specify a minimum of six (6) follow-up tests in 12 months after an employee returns to duty. Are employees who return to duty also returned to the general random testing pool?**
- A. Yes. The employee is returned to the random pool upon return to duty.
- Q. If an employee changed jobs prior to the completion of the six (6) follow-up tests, what testing would be required of the new employer—just a pre-employment test or a continuation of the follow-up test?**
- A. The new employer would require a pre-employment test and would not have to continue the follow-up testing.
- Q. The rules require referral to an SAP. If any employer's policy is to fire all employees who receive verified positive drug test results or tests for alcohol at 0.04 or above, what is the purpose of the SAP? Must an employer refer prior to dismissal?**
- A. Any employee who is covered by FTA's drug and alcohol regulations and has a verified positive drug test or alcohol test result of 0.04 or greater must be referred to an SAP. This does not preclude the employer from applying additional consequences, e.g., immediate dismissal, to the affected employee. However, it must be clearly understood that the employer is doing so under its own company policy, and not any Federal authority.
- Q. Can an employer conduct both a drug test and alcohol test under the return to duty provision?**
- A. An employer may, based on the recommendations of the substance abuse professional, also subject an employee who previously had a verified positive drug test result under the FTA prohibited drug rule to a return to duty alcohol test. In addition, an employer may, based on the recommendations of the SAP, subject an employee who previously had an alcohol test result at or greater than 0.04 to a return to duty test for prohibited drugs.
- Q. Can a traffic citation be used as a reason for a post-accident test?**
- A. Not solely. In addition to the citation, a vehicle involved in the incident (either the mass transit vehicle or the other vehicle) must be towed away from the scene to trigger a post-accident test or there has been an injury requiring immediate medical treatment away from the accident scene.
- Q. If an employee is required to submit to follow-up testing under the drug rule, can he or she be required to also submit to follow-up testing for alcohol also?**
- A. If the SAP thinks it is appropriate, then the employer may test for drugs and alcohol on follow-up.

Q. After being notified by a Medical Review Officer (MRO) of a verified positive drug test, an employee has 72 hours to request that the split sample be tested. When does the 72-hour period begin and end?

A. The 72 hours begin when the employee has been notified by the MRO. Because most transit systems operate seven days a week and during holidays, we have decided that the 72-hour time period includes both holidays and weekends.

TRAINING

Q. As a result of the New York subway accident, it was learned that the employee involved did not remember receiving alcohol misuse handouts. Why isn't the FTA requiring classroom training on alcohol?

A. There is no guarantee that classroom training is more memorable than literature provided to employees. Specialized training of employees concerning the dangers of performing safety-sensitive functions after using alcohol does not seem necessary. Most employees are familiar with alcohol and its effects. Through anti-drunk driving campaigns and existing industry safety programs, the message that one should not drink and drive (or perform other safety-related duties) is a very pervasive one nowadays.

Q. Why are you requiring training for mass transit employees on drug use but not on alcohol misuse?

A. Among many employees, information about drugs—what they are, what their effects are, what legal consequences for their use are—is less likely to be a matter of common knowledge than information about alcohol and its misuse. Training is more useful when it fills what may be an information gap.

Q. Employees are to be provided with materials on the drug and alcohol testing policies and procedures. What materials should be provided to contract employees? Do they get the materials from the FTA-funded operator or from their own firm? What if the policies of the operator differ from the subcontractor (i.e., the operator offers rehabilitation on a 50/50 cost share for the first offense, but the subcontractor fires all drivers who fail a drug test)? Which policies will prevail?

A. FTA drug and alcohol rules require an employer to make available to every safety-sensitive employee, whether direct hire or under contract, a policy statement describing the employer's prohibited drug and alcohol misuse programs. The rules do not preclude the employer from having sanctions under its own authority in addition to those mandated by FTA, but it must be clearly defined as separate from FTA's requirements.

- Q. The rules specify a certain number of hours of training for employees and supervisors. Are these hours of training a one-time requirement or are they periodic? What would happen if a supervisor changed jobs? Would additional training hours be required?**
- A.** The training requirements in the rules are one-time requirements. While it could be considered “best practice” to provide refresher training, the rules remain silent on this issue and additional training is left to the discretion of the employers. If a supervisor becomes responsible for making reasonable suspicion referrals, that supervisor must receive additional training.
- Q. How much training are employers required to provide under these regulations?**
- A.** There is a major difference between the two rules concerning the amount of time required for training of covered employees. No specific training is required for safety-sensitive employees for alcohol misuse; however, 60 minutes of instruction is required for employees on prohibited drug use. Supervisors who make reasonable suspicion determinations must receive 60 minutes of training for drugs and 60 minutes to detect the signs and symptoms of alcohol misuse for a combined total of two (2) hours.

RECORDKEEPING

- Q. The rules mandate the retention of many records for varying periods of time. Who would be responsible for maintaining the records of an agency that ceased operation – especially private nonprofit agencies that have no direct connection with a successor agency?**
- A.** Recipients have the ultimate responsibility to maintain the records. In the case of a defunct agency, the recipient would be responsible to FTA for maintaining the records. The company should ensure that this requirement is met in the event of the situation described above. A possible repository of these records could be the State DOT or its legal counsel.
- Q. Employers are to submit annual management information system (MIS) reports directly to FTA. What are the time frames for those that must first submit their report to the State which in turn submits to FTA?**
- A.** In the final rule we have retained the requirement that a State collect and submit to FTA its subrecipients’ MIS reports. Recipients and subrecipients must submit their own annual reports as well as an annual report from each of their contractors with covered employees. States are treated exactly the same as other recipients and hence must meet the same reporting deadlines. Each report submitted must cover a calendar year. The closing date for data is December 31 and the report is due at FTA by March 15 of the following year.

- Q. The confidentiality of tests is an integral part of the overall program. Can results of alcohol or drug tests be kept as part of a permanent personnel file, especially if the files contain other materials that are part of a grievance or termination process?**
- A.** Employers are required to maintain drug testing records in a secure manner, so that disclosure of information to unauthorized persons does not occur. It is suggested that test results be maintained in a confidential medical file to ensure employee privacy.
- Q. How should forms be filled out when one person performs several safety-sensitive functions? In small agencies a supervisor may be a backup driver or a driver may double as a dispatcher.**
- A.** The employee should be accounted for in whichever safety-sensitive function constitutes the most of his or her on-duty time.

REHABILITATION

- Q. Does the FTA require treatment or rehabilitation as a mandatory requirement of a transit operator's substance abuse program? If so, who pays?**
- A.** The FTA does not require rehabilitation for employees. If an employee undergoes treatment, the rule does not address the issue of who should pay for it. We believe that this issue should be decided at the local level.

§40.21 THE DRUGS

- Q. Is testing for additional drugs authorized? Must a separate specimen be obtained?**
- A.** Under 49 CFR part 40, an employer must test for the following drugs: marijuana, cocaine, amphetamines, opiates, and phencyclidine. An employer may not test for any other substances *under DOT authority*. 49 CFR part 40 does not, however, prohibit an employer from testing for other controlled substances *as long as that testing is done under the authority of the employer*.

Employers in the transportation industry who establish a drug testing program that tests beyond the five drugs currently required by 49 CFR part 40 must also make a clear distinction to their employees what testing is required by DOT authority and what testing is required by the company. Additionally, employers must ensure that DOT urine specimens are collected in accordance with the provisions outlined in 49 CFR part 40 and that a separate specimen collection process including a separate act of urination is used to obtain specimens for company testing programs.

Q. Should labs conduct tests for five (5) drugs even if the drug testing custody and control form fails to indicate what tests are to be performed?

A. 49 CFR part 40 indicates that DOT agency drug testing programs require that employers test for marijuana, cocaine, opiates, amphetamines, and phencyclidine (§40.21). All DOT specimens, therefore, must be tested for the above five categories of drugs even if the accompanying drug testing custody and control form fails to indicate this.

While the Department does not view this type of collection site error to be a fatal flaw, it, nevertheless, jeopardizes the integrity of the entire collection process and could lead to a challenge and subsequent third party review. These errors should be addressed with the site supervisor in the hope of preventing future mistakes.

§40.23 PREPARATION FOR TESTING

Q. Is the collector's signature required on the chain of custody section of drug testing custody and control form?

A. The collector's signature is required in both the "received by" and the "released by" spaces in Step VII of the drug testing custody and control form. 49 CFR part 40 (§40.23(a)(1)(viii)) specifies that the form shall provide both "received by" and "released by" entries of the collector's signature and printed names. Combining these entries is not authorized by the rule.

Q. Does the regulation require the drug testing custody and control form to have a pre-printed specimen ID number?

A. Section 40.23 of 49 CFR part 40 *does* require use of drug testing custody and control form that has a unique preprinted specimen identification number on all copies of the form. The label on the specimen bottle must also bear the same specimen identification number as that on the custody and control form accompanying the specimen. There is no absolute requirement that the specimen identification number on the bottle label be pre-printed. It is acceptable practice for the specimen identification number to be recorded or entered on the bottle label by the collection site person. However, the use of a pre-printed bottle label is greatly recommended to decrease the risk of an error in recording the correct specimen identification number. If the specimen identification number on the bottle and on the custody and control form do not match, the specimen's chain of custody is broken and the specimen is invalid.

Q. Can the drug testing custody and control form be used for non-DOT tests?

A. Employee drug testing conducted under local, State, or private authority should not be represented to the employee as being Federally mandated or required. The use of the custody and control form required under 49 CFR part 40 conveys that the testing is being conducted in accordance with applicable Federal regulations.

The Department has formed a working group from selected NIDA laboratories and collection facilities. This working group's objective is to achieve further standardization and applicability of custody and control forms currently in use for DOT-mandated testing. It is expected that a standardized custody and control form will be in place by 1995.

In the interim, employers may use custody and control forms that make no reference to Federal regulation for testing conducted outside of the DOT-mandated requirements.

Q. Is collection of blood authorized? Can blood specimens be supported by the drug testing custody and control form? Can blood test results be used to take DOT-required administrative actions?

- A. 49 CFR part 40 (54 FR 49854), Procedures for Transportation Workplace Drug Testing Programs: Final Rule, December 1, 1989, sets forth the guidelines for employers who must conduct urine testing programs under regulations issued by the various agencies of the Department of Transportation.

The collection of blood for drug testing under DOT authority is not authorized. Therefore, while a company, under its own authority, may require a blood specimen to be collected and tested for drugs and/or alcohol under certain circumstances, it is not acceptable for the company-required blood specimen to be supported by the same custody and control form that accompanies a DOT-required urine specimen.

If a urine specimen for a DOT reasonable cause test is rejected for testing at the laboratory, results from a blood specimen collected in accordance with a company policy could be used to take action against an employee depending upon the drug testing policy established by that company. Under no circumstances, however, can the results of the blood test be used to take administrative or disciplinary action against an employee using DOT authority for the reasons cited above.

Q. Is the collector required to sign or initial the shipping container label?

- A. Sections 40.23(c) and 40.25(h) of 49 CFR part 40 describe the requirements for packaging the specimen and custody and control form in preparation for shipment to the laboratory. Section 40.23(c) states that the shipping container must be sealed and initialed to prevent undetected tampering. Section 40.25(h) states that the collection site person shall sign and enter the date specimens were sealed in the shipping containers for shipment. The Department has determined that initialing and dating the seal by the collection site person is sufficient to meet the intent of the regulation.

Q. How and to whom are drug testing custody and control forms distributed?

- A. The only acceptable procedures for handling the custody and control form as specified in 49 CFR part 40 (§40.23 [a]) are as follows: Parts 1 and 2 must accompany the urine specimen in a sealed container to the laboratory; Part 3 (MRO) must be sent from the collection site directly to the physician (MRO); Part 4 is given to the donor at the

collection site; Part 5 is retained by the collection site personnel; and Part 6 is provided to the employer representative. It is unacceptable for the MRO copy of the form to accompany the urine specimen either to the laboratory or to the MRO. Clearly the intent of the regulation is for the urine specimen and Parts 1 and 2 of the custody and control form to be sent directly from the collection site to the laboratory, and the MRO (Part 3) copy of the custody and control form to be sent directly to the physician. There is no need to maintain a chain of custody tracking the handling of the sealed shipping container or the MRO copy of the form.

Q. Should a specimen be rejected by a lab if the donor-identifying information is erroneously provided?

- A. The intent of the DOT procedures (49 CFR part 40, §40.23 [a][6]) is to limit the amount of personal identifying information that is recorded on the specimen bottle and those copies of the drug testing custody and control form that accompany the specimen bottle to the laboratory. The rule only requires that a donor initial the specimen bottle label/seal and provide a social security number or employee identification number to be recorded on the laboratory copies of the drug testing custody and control form. The rule does not allow for additional personal information to be provided to the laboratory. In fact, the intent was to prevent the donor's identity from being *routinely* disclosed to the laboratory.

It was never intended, however, that the *inadvertent or erroneous* disclosure of the donor's identity (i.e., name or signature) on the specimen bottle or laboratory copies of the drug testing custody and control form be justification, in and of itself, for a laboratory to reject the specimen for testing or for a Medical Review Officer to invalidate the test results. Furthermore, all accessioning procedures at laboratories certified by the Department of Health and Human Services require that specimens be identified by specimen identification number, donor identification number, and laboratory accession number only. Even though laboratory accessioning personnel may have access to a donor's name in these cases, the analytical personnel will not. Therefore, the donor's identity is still protected during the actual testing process.

Q. Must the collector provide a real name on the collector certification section of drug testing custody and control form?

- A. The intent of the DOT drug testing custody and control form is to provide complete documentation of the specimen collection process including the name of the collector and the location of the collection site. The collection site person who receives the urine specimen from the donor should be identified by name on the block specifying "collector's name." Use of a "code name," collector I.D. number, or other substitution for the collector's name is not acceptable. The collector's name should be the same as that appearing on the identification each collector is required to make available to the donor, if so requested.

Q. Are middle names required on the drug testing custody and control form?

- A. Section 40.25(a) of 49 CFR part 40, Procedures for Transportation Workplace Drug Testing Programs, specifies that the custody and control form used to document DOT-mandated drug testing shall provide space for collector, donor, and laboratory certifying scientist names and signatures. The regulation does *not* specify that a middle name must be used. The intent of the regulation is to provide for the identification of the person(s) signing the certification statements. The use of supplemental instructions on the custody and control form (e.g. further defining name to include first, middle, last), does not impact on the security, identification, or integrity of the urine specimen and should not be used as a basis for invalidating the specimen results.

Q. Is the MRO name required on the drug testing custody and control form? Can the MRO's company name be used instead?

- A. The regulation, 49 CFR part 40.23(a)(i)(iv), specifies that the form must have a block that would accommodate the MRO's name and address. The laboratory that does the test must know where to send the test result. The donor has the right to know who will be doing the verification of the laboratory result.

Having stated the above, it is the interpretation of the DOT that a specific physician's name and address should appear on the form. If that physician does not perform the MRO functions himself/herself, the clinic or MRO service should have documentation of physicians who are authorized to conduct MRO functions on behalf of the named MRO. It is always the employer's responsibility to designate a physician(s) to perform the MRO duties.

§40.25 SPECIMEN COLLECTION PROCEDURES

Q. Is the collector's name required on the drug testing custody and control form?

- A. Pursuant to 49 CFR part 40, the collector's name and certification are required as part of the collection process (§40.25). This is necessary to ensure the integrity of the testing process and to initiate the chain of custody. It is the Department's position that an individual submitting to testing under this rule shall have a reciprocal right to know the collector's name and to see the collector's work identification (§40.25(f)[27]). Any collection site that deviates from this process will be violating the rule.

Q. Are split sample collections authorized?

- A. The Department's final rule issued February 15, 1994, 49 CFR part 40, Procedures for Transportation Workplace Drug Testing Programs requires the use of "split sample" procedures by employers covered by the FTA rule. In a split sample procedure, a sufficient volume of urine is collected so that it may be divided into two specimens (the first containing at least 30 ml of urine, the "split" containing at least 15 ml of urine). If the first specimen is positive, the split specimen may be analyzed at another Department of Health and Human Services certified laboratory, if requested by the employee.

Q. May donors be required to strip, wear a hospital gown, or empty pockets?

- A. The Department's procedures for transportation workplace drug testing programs contained in 49 CFR part 40, December 1, 1989, §40.25(f)(4) states: "The collection site person shall ask the individual to remove any *unnecessary outer garments* such as a coat or jacket that might conceal items or substances that could be used to tamper with or adulterate the individual's urine specimen. The collection site person shall ensure that all personal belongings such as a purse or briefcase remain with the outer garments. The individual may retain his or her wallet." (Emphasis added.)

While it is clear that the rule does allow for collectors to request that donors remove unnecessary outer garments in order to ensure the integrity of the collection, the rule does not authorize collectors to require or request that donors remove other garments as well, e.g. shirts, blouses, pants, or skirts, thereby ensuring a modicum of privacy and reducing potential embarrassment. Additionally, donors may not be required or requested to wear hospital or examination gowns when providing a specimen.

There is an exception to the above. The Department has determined that if a urine specimen is being collected as part of a DOT-required physical examination in which an individual is required to disrobe and wear a hospital or examination gown, the collection may be completed with the donor so attired.

It should also be noted that if a collection site person, during the course of a collection procedure, notices an unusual indicator that an individual may attempt to tamper with or adulterate a specimen as evidenced by a bulging or overstuffed pocket for example, the collector may request that the donor empty his or her pockets, display the items, and explain the need for them during the collection. This procedure may be done only when there is a suspicion that an individual may be about to tamper with or adulterate a specimen. Otherwise, requiring donors to empty their pockets as a common practice is also prohibited under the current rules.

Q. What if a donor is physically unable to provide a specimen?

- A. The Department's procedures in 49 CFR part 40 do not address the circumstance of individuals physically unable to provide a urine specimen except in §40.25 (f)(10)(i)(C). Specific documentation of the individual's medical condition, including the fact that he/she is unable to provide a urine specimen should be obtained and furnished to the employer. The Medical Review Officer should, after a thorough evaluation of the individual's circumstance, notify the employer that the individual cannot provide a urine specimen.

Q. Please clarify donor identifying information requirements on the drug testing custody and control form.

- A. In accordance with 49 CFR part 40 (54 FR 49854) Section 40.25(f)(20), the donor/employee is required to initial the specimen bottle seal/label. The employee/donor's identification number or SSN is to be provided on the custody and control form and may be included on the specimen bottle seal/label. Other donor identification (i.e., name,

signature) should not be provided on the copies of the custody and control form that accompany the specimen to the laboratory. However, disclosure of the donor's name/signature does not, in and of itself, require that the specimen be rejected for testing by the laboratory.

Q. Is a consent form authorized?

- A. 49 CFR part 40, §40.25 (f)(22)(ii) addresses this issue and has not been changed since its publication in the *Federal Register* on December 1, 1989. Specifically, it states, “*When specified by DOT agency regulation or required by the collection site (other than an employer site) or by the laboratory, the employee may be required to sign a consent or release form authorizing the collection of the specimen, analysis of the specimen for designated controlled substances, and release of the results to the employer.*” The purpose of this statement is to allow collection sites or laboratories, under their own accord, or when required by a DOT agency regulation to utilize consent or release of information forms for the collection, analysis, and release of specimen results to the employer. §40.25 (f)(22)(ii) continues, “*The employee may not be required to waive liability with respect to negligence on the part of any person participating in the collection, handling, or analysis of the specimen or to indemnify any person for the negligence of others.*” The intent of this statement is to prevent anyone who participates in either the collection, handling, or analysis of the specimen to have the employee exempt them from liability arising from their actions. This pertains not only to collection site and laboratory personnel, but also to Medical Review Officers, their staff, if applicable, and to the employer.

Q. Please address the issue of low specific gravity/creatinine.

- A. The DOT drug testing procedures rule, 49 CFR part 40, addresses the issue of creatinine and specific gravity levels in urine specimens only in the context of the employee's (donor's) right to privacy during collection of a urine specimen [see §40.25 (e)(2)(ii)]. If the last specimen provided by the employee was determined by the laboratory to have a specific gravity of less than 1.003 and a creatinine concentration below .2g/L, the donor *may* lose his/her right to privacy during any subsequent urine collection. There is no authority under the rule for an MRO to cancel a test result based on creatinine and specific gravity levels. The MRO may, however, inform the employer when specific gravity and creatinine levels are below 1.003 and .2g/L, respectively, so that subsequent collections may be conducted under direct observation. It is the responsibility of the employer representative or collection site supervisor to determine when a direct observation collection is warranted.

Q. Is the donor's presence required when the collector prepares a specimen for shipment?

- A. The tamper-proof seal placed on the specimen bottle must be affixed in the presence of the donor, but the regulation is clear that the donor does not have to be present when the specimens are prepared for shipment to the laboratory. The collection site person is the only person required to sign or initial the seal on the shipment container. In fact, the rule allows the use of shipment containers that accommodates multiple specimen bottles. It

would be impossible to have more than one donor witness the sealing of their specimen bottles in one shipment container when collectors are restricted by rule to administer to only one donor at a time.

Q. What should donors do if specimen collection procedures are not being followed?

- A. Under DOT agency regulations, the employer is responsible for ensuring that specimens are collected in accordance with 49 CFR part 40. If the employees subject to DOT-mandated drug testing regulations believe that collection procedures are not being followed as prescribed in 49 CFR part 40, they should so inform the employer. If the employer does not respond to the complaints and take appropriate corrective actions, the employees may seek resolution of their complaints through a DOT agency that has regulatory authority over the employer.

Q. In a post-accident situation requiring both a company test and a DOT test, which should be conducted first?

- A. In a post-accident situation in which drug/alcohol testing is required under company authority or policy, and DOT-mandated tests are required, the DOT tests must be conducted first.

Q. Is failure to check the temperature box on the Drug Testing custody and control form considered a fatal flaw?

- A. In accordance with 49 CFR part 40 (54 FR 49854) Section 40.29, the collector is to check the temperature of the specimen to ensure the integrity of the specimen. The fact that it was checked should be marked appropriately on the custody and control form. Inadvertently *not* marking the temperature taken box, in and of itself, does not constitute a "fatal flaw" in the DOT chain of custody process.

Q. What are the collection site requirements?

- A. The Department's Procedures for Transportation Workplace Drug Testing Programs contained in 49 CFR part 40, December 1, 1989, §40.25(a)-(b) outline employer requirements for designating and maintaining the security of collection sites. To summarize the contents of this section, a collection site must at a minimum provide:

- (1) An enclosure where privacy for urination is possible
- (2) A toilet for urination (unless a single use, disposable container is used with sufficient capacity to contain the entire void)
- (3) A source of water for washing hands

- (4) A suitable writing surface for completing the required paperwork (custody and control form)
- (5) Restricted access so that the site is secure during collection.

Any facility, to include a physician's office, that meets the above minimum requirements may be used as a collection site for DOT-required drug tests. It is the employer's responsibility to not only designate and ensure that collection sites meet these minimum requirements, but also to ensure that collection site personnel at these locations are properly trained and/or qualified to collect urine specimens in accordance with the provisions outlined in 49 CFR part 40.

§40.29 LABORATORY ANALYSIS PROCEDURES

Q. Explain the requirements for monthly lab summaries.

- A. Section 40.29(g)(6) of 49 CFR part 40 requires each laboratory to "provide the employer official responsible for coordination of the drug testing program a monthly statistical summary of urinalysis testing of the employer's employees."

The above reference also contains the following information: "Monthly reports shall not include data from which it is reasonably likely that information about individuals' tests can be readily inferred. If necessary, in order to prevent the disclosure of such data, the laboratory shall not send a report until data are sufficiently aggregated to make such an inference unlikely. In any month in which a report is withheld for this reason, the laboratory will so inform the employer in writing."

Further, the Department has held that during a month in which there was "no activity" the laboratory is still required to inform the employer, in writing, of the negative activity. This provision is currently necessary to assist Federal auditors during inspections of employers that are required by an Operating Administration to conduct a drug testing program. Unless the auditor has a complete month-by-month history and record of drug testing results from a laboratory, there is nothing to preclude an employer, for example, from destroying a monthly summary that does contain a confirmed positive result and claim that there simply was no activity during the month. This, of course, would allow the company to continue to use that individual in a safety-sensitive function with no evidence that there was a confirmed positive drug test result. In effect, the negative lab report serves as an important check and balance used by auditors in their compliance and enforcement efforts.

Q. May labs transmit results to an MRO by faxing Part 2 of drug testing custody and control form?

- A. Laboratory test results may be provided to the Medical Review Officer via facsimile transmission of the custody and control form. However, the "true copy" of the custody and control form must also be sent to the MRO. The purpose of permitting facsimile transmission of the custody and control form is to facilitate a quicker administrative

review of test results by the MRO. The MRO may complete verification of a negative result based on the facsimile of the custody and control form; however, the verification of a positive result cannot be completed until the "true copy" of the custody and control form bearing the original signature of the laboratory's certifying scientist is received by the MRO.

Q. Can a lab certifying scientist use a "signature stamp"?

- A. In accordance with 49 CFR part 40 (54 FR 49854) Section 40.29, paragraph (g)(5) "in the case of a positive report for drug use, shall be signed (after the required certification block) by the individual responsible for day-to-day management of the drug testing laboratory or the individual responsible for attesting to the validity of the test reports... ."

In accordance with 49 CFR part 40 (54 FR 49854), Section 40.29, paragraph (g)(3), "Before any test result is reported (the results of initial tests, confirmatory tests, or quality control data), it should be reviewed and the test certified as an accurate report by the responsible individual." The Department's opinion is that negative reports must be reviewed and the test certified as an accurate report by the laboratory's responsible individual. This certification can be accomplished by a signature or a signature stamp with initials on the custody and control form.

Q. Does the regulation require lab "batch reporting" of drug test results?

- A. The laboratory may report results to the MRO as soon as the results have been reviewed by the appropriate laboratory personnel. There is no requirement for "batch reporting," or reporting simultaneously all results for specimens received in a given shipment. Nor does 49 CFR part 40 require "batch reporting" of results by the MRO to the employer. While the practice of reporting negative results before positive results have been verified may lead to an employer making premature assumptions about a particular test result, the rule provides no authority for an employer to take any adverse action against an employee whose test result is pending. The differences in reporting time of test results may be due to a variety of circumstances including laboratory processing time, MRO administrative review processes for negatives, or the verification process for positives.

Q. Is a lab required to send results directly to the MRO?

- A. With regard to routing laboratory test results, 49 CFR part 40.29 (g)(4) states: "The laboratory may transmit results to the Medical Review Officer by various electronic means ... in a manner designed to ensure confidentiality of the information... . *The laboratory and the employer must ensure the security of the data transmission and limit access to any data transmission, storage, and retrieval system.*" §40.29 (g)(5) further explains: "*The laboratory shall send only to the Medical Review Officer the original or a certified true copy of the drug testing Custody and Control form (Part 2)*"

Regarding the Medical Review Officer review process of positive test results, §40.33(b)(3) states: "*The role of the Medical Review Officer is to review and interpret confirmed positive*

test results obtained through the employer's testing program.” In §40.33(c)(2): “The MRO shall contact the individual directly, on a confidential basis, to determine whether the employee wishes to discuss the test result. A staff person under the MRO's supervision may make the initial contact, and a medically licensed or certified staff person may gather information from the employee.”

The duties of the MRO with respect to reviewing negative results are administrative. This administrative review should include a review of the drug testing custody and control form to substantiate that the reported negative result is correctly identified with the donor and to ensure that the form is complete and sufficient on its face. This is contained in §40.33(a)(1) and (2). Since publication of 49 CFR part 40, the Department has allowed this review to be conducted and verified by a staff person under the MRO's supervision.

Given all of the above, it should be clear that the intent of the current regulations is that all laboratory test results would be sent directly to the MRO. The MRO must make the verification determination on positive results and the MRO may delegate to a person *under his/her direct supervision* the administrative review of the negative results.

- Q. Does the regulation allow the MRO to disclose to the employer the drug(s) involved in a positive test?**
- A. Section 40.29(g)(3) of 49 CFR part 40, Procedures for Transportation Workplace Drug Testing Programs: Final Rule, December 1, 1989, requires MROs to report to employers whether the drug test was positive or negative. It also *allows* the MRO to report the drug(s) for which there was a positive test.

§40.31 QUALITY ASSURANCE AND QUALITY CONTROL

- Q. Please explain the timing of blind performance test specimens.**
- A. 49 CFR part 40 in Section 40.31(d) delineates employer and consortia blind performance test requirements. The intent of the requirements in 49 CFR part 40 is to test the laboratory's ability to correctly identify positive and negative samples. These samples are to be unidentifiable as blind samples by the laboratory.

The regulation does not specify the distribution or the timing of the submissions except to stipulate in Section 40.31(d)(2) that each “employer shall submit three blind performance test specimens for each 100 employee specimens it submits, up to a maximum of 100 blind performance test specimens submitted per quarter.” This is the basic requirement. The optimum program would be to evenly space the submission of blind samples throughout the period.

§40.33 REPORTING AND REVIEW OF RESULTS

Q. When can the MRO notify an employer of a positive drug test result?

- A. The MRO may not notify the employer of a positive test until he/she has *verified* the test as positive. Verification requires that the MRO review the chain of custody documentation, contact the employee, review any documentation of a legitimate medical explanation for a positive test, and determine that the positive resulted from unauthorized use of a controlled substance. The MRO is not required to delay verification pending the outcome of the reanalysis or the split analysis. Only upon verification shall the MRO notify the employer of the positive result, and the employer shall then remove the employee from the safety-sensitive duties/position. Once having received notice of a verified positive result from the MRO, the employer shall not delay removal of the employee from safety-sensitive duties pending the outcome of the reanalysis or the split analysis.

Q. Please explain MRO qualifications. Is certification required?

- A. 49 CFR part 40 (§40.33(b)(1)) states that the MRO shall be a licensed physician with knowledge of substance abuse disorders. There is no DOT certification program for MROs; nor is there a requirement that physicians complete any specialized training for MRO duties.

Q. Must the MRO report to employers be in writing?

- A. 49 CFR part 40, Procedures of Transportation Workplace Drug Testing Programs does not require the MRO to provide written notification to employers of verified drug test results. Such written notification, however, is encouraged.

Q. Can an MRO use Part 2 of Drug Testing Custody and Control Form to report negative results?

- A. The drug testing laboratory is required to send the original or copy of the drug testing custody and control form to the Medical Review Officer. The results of the drug test are to be recorded on the custody and control form; and, in the case of a positive result, the laboratory's certifying scientist must sign the custody and control form. Upon receipt of the copy of the custody and control form from the laboratory, the MRO shall verify the test result (contacting the donor if required) and notify the employer of the MRO decision. The MRO, however, should not provide the employer with a copy of the custody and control form bearing the results from the laboratory. Often, positive results reported by the laboratory are determined by the MRO to be explained by authorized medical use of a substance, and thus are verified and reported negative. Employers are not permitted to have the laboratory information, only the MRO's determination. In the case of verified positive results, the MRO may provide the employer with a copy of the custody and control form bearing the laboratory results, so long as quantitative levels of the drugs discovered are not provided.

Q. Please explain an MRO's review of negative results.

- A. The duties of the MRO with respect to reviewing negative urine drug test results are strictly administrative, but must include a review of the drug testing custody and control form prior to releasing the results to the employer. This is necessary to substantiate that the reported negative result is correctly identified with the donor and to ensure that the form is complete and sufficient on its face (49 CFR part 40.33(a)(1-2)). While the Department, through interpretation, has permitted the administrative review to be conducted by a staff person working under the direct supervision of the MRO, the requirement to conduct the review in accordance with current regulations remains in effect.

Q. Please explain MRO verification of opiate positives.

- A. The MRO verification process of any positive laboratory report requires several specific actions. These include a review of the drug testing custody and control form for completeness and accuracy, notifying and providing the donor an opportunity to discuss the results, reviewing the donor's medical history and medical records, and investigating other biomedical factors that may account for the positive result.

The above actions are especially important when the MRO is confronted with an opiate positive, as the result may be caused by the use of a legally prescribed medication or an ingested substance, such as poppy seeds. Using the above steps as a guide, the MRO first ensures that the drug testing custody and control form is complete and accurate on its face. Next, the MRO notifies the donor of the positive test result and offers the individual an opportunity to discuss the results. If the donor expressly declines the opportunity to discuss the test results, or fails to contact the MRO within five days after being notified by a designated employer representative to do so, the MRO may verify the laboratory test result as a positive. This includes results that are positive for opiates.

If the donor accepts the opportunity to discuss the results with the MRO, the MRO must review any medical records provided by the donor to determine if the opiate positive resulted from a legally prescribed medication. If the donor is unable to produce medical evidence and either admits to unauthorized use of an opiate or acknowledges using another individual's prescribed opiate medication, the MRO should also verify the result as a positive.

However, if the donor is unable to produce medical evidence, denies unauthorized use of an opiate, or denies using another individual's medication, the MRO *must determine that there is clinical evidence—in addition to the urine test—of unauthorized use of any opium, opiate, or opium derivative before verifying the test result as positive*. Examples of clinical evidence include recent needle tracks or behavioral or psychological signs of acute opiate intoxication or withdrawal. Clinical evidence is also required to verify a positive opiate result whether or not the donor claims poppy seed ingestion as a defense for the positive result.

The verification process for an opiate positive result can be a very complex and very difficult task for the MRO and should be undertaken with a great deal of caution.

Q. Please clarify the MRO/lab relationship.

- A. 49 CFR part 40.33(b)(2) states: The MRO shall not be an employee of the laboratory conducting the drug test unless the laboratory establishes a clear separation of functions to prevent any appearance of a conflict of interest, including assuring that the MRO has no responsibility for, and is not supervised by or the supervisor of, any persons who have responsibility for the drug testing or quality control operations of the laboratory. While the current rule does not prohibit an employer-employee relationship between the laboratory and the MRO, it is obvious that there must be a clear separation of functions between the MRO and the laboratory.

Q. In what situations can an MRO reopen a verification?

- A. The provisions of 49 CFR part 40 specifically permit the reopening of a Medical Review Officer's verification of a confirmed positive drug test in only one situation (40.33(c)(6)). When a donor who failed to contact the MRO within five days after being notified to do so presents documentation of circumstances that prevented his/her from doing so.

§40.35 PROTECTION OF EMPLOYEE RECORDS

Q. Please clarify release of drug test results with/without written authorization.

- A. The rules governing release of employee test results (49 CFR part 40, §40.35) permit disclosure to persons other than the employee, employer, or decision-maker in a lawsuit or grievance action, only with the written authorization of the employee. If the employee authorizes release to a trade association and the association intends to release the information to its members, the employee authorization should include such provisions. The authorization should be an informed consent, in that the employee fully understands the intended use and disclosure of the test results. Each test result would require a separate authorization.

Q. Can employees be required to sign release forms for third-party disclosures?

- A. The intent of 49 CFR part 40 (§40.29(g)(3), 40.35 and 40.37) is to ensure confidentiality of employee drug test results. Employees should not be required to sign release or consent statements for third-party disclosure as part of the drug testing process. Information concerning the drug test may be released by the employer in unemployment or workmen's compensation proceedings, or other situations in which the employee challenges an action taken by the employer as a result of a drug test.

Q. Please explain the release of drug test results for unemployment compensation.

- A. The provisions of 49 CFR part 40 (§40.35) do not permit the employer, simply on the basis of a claim for unemployment compensation being filed, to protest in full from the outset, citing the positive drug test and furnishing all related documents. If the

employee's dismissal is based on misconduct as defined in company policy, and the employee protests the dismissal for cause, the employer may introduce drug test information during the hearing or appeal process as evidence of violation of the company policy prohibiting drug use.

In accordance with 49 CFR 40.35, the drug testing laboratory may release drug test information to the decision-maker in a proceeding initiated by or on behalf of the employee and arising from a certified positive drug test. Drug test results may be released by the laboratory to the employer at the hearing or appeal process, but not at the initial filing for benefits. Documentation of the Medical Review Officer's verification of a certified laboratory result is available to the employer and the employee.

The DOT regulations do not require that employees who test positive be discharged, only that they cannot perform safety-sensitive functions until again qualified in accordance with the applicable provisions of the regulations. Accordingly, any decision to discharge an employee who tests positive must be based on some grounds independent of the positive test result (an employer policy, for example). If a discharged employee later asserts, in a claim for unemployment compensation, that he/she had not violated the company policy on drug use, information about the results of a drug test could be introduced by the employer. Additionally, the DOT has no opinion on the State's ruling on the employee's entitlement to unemployment compensation.

§40.39 USE OF DHHS-CERTIFIED LABORATORIES

Q. Why use DHHS-certified laboratories?

- A. The Department of Transportation (DOT) requires that all drug testing mandated under the provisions of its drug testing rules must be conducted in DHHS-certified laboratories. The DOT decided to require the use of DHHS-certified laboratories for drug testing mandated in the regulated industries for several reasons. Most significantly, the DHHS standards for certification and the proficiency testing requirements comprise the most stringent laboratory accreditation program available in analytical forensic toxicology for urine drug testing. Additionally, the DHHS-certification program provides for standardization of laboratory methodology and procedures, ensuring equal treatment of all specimens analyzed. And finally, the use of DHHS-certified laboratories provides a standard that has withstood the test of legal challenges in Federal drug testing.

MISCELLANEOUS INTERPRETATIONS

Q. Please explain the 50 percent random testing rate.

- A. The Department of Transportation drug testing rules require employers to conduct random testing at a rate equal to 50 percent of its covered employees. Thus, if an employer has 100 covered employees, the employer must administer 50 random drug tests. The number of random tests is determined by the covered employee population, while the number of employees randomly tested varies depending on the random selection process.

It is possible that 50 random tests may be conducted on less than 50 employees, some employees being tested two or more times due to the random selection of donors.

Q. Is use of a consortium to conduct random testing allowed?

- A. The Department allows and even advocates the use of a consortium to assist smaller companies in complying with the current drug testing regulations. While it is true that in a combined employer pool, some employers will have a higher percentage of their employees selected for testing than others in a given 12-month period, over time this will even out. Additionally, the Department believes that the deterrent effect of random drug testing remains as powerful in a combined employers pool as it would be in a stand-alone single company pool. With this in mind, the Department has determined that combining employer pools within a consortium meets the spirit and intent of the drug testing regulations and is, therefore, permissible.

Q. Can an employer combine DOT and nonDOT random pools?

- A. While it would seem to be advantageous for an employer to combine all employees into one random testing pool, this move could dilute the number of DOT-covered employees who would actually be tested. For example, in a pool that is comprised of 50 DOT-covered employees and 50 nonDOT employees, and assuming a testing rate of 50 percent, it is possible that no DOT-covered employees would be tested (100 employees, 50 tests, all 50 tests conducted on nonDOT employees). The likelihood of this happening, albeit remote, is possible under a truly random scheme. On the other hand, keeping the above two classes of employees in separate pools *assures* that at least 25 of the tests conducted by the company will be conducted on DOT employees. It is this assurance that ultimately mandates that DOT-covered employees remain in separate random pools.

Q. Can an employer combine employees covered by different operating administration rules into a single pool for random testing?

- A. The Department has determined that it is, indeed, permissible for an employer to combine covered employees from different operating administrations, (e.g. Research and Special Programs Administration, Coast Guard, and Federal Highway Administration) into a single selection pool for the purpose of conducting random drug testing under DOT authority. When exercising this option, however, the employer must ensure that the random testing rate is at least equal to the highest rate required by each of the operating administrations.

Q. Is it permissible to separate union and nonunion employees, both covered by DOT, into stand-alone pools?

- A. The Department has determined that it is permissible for an employer to separate union and nonunion employees into separate pools for the purpose of random drug testing. If using this approach, the employer must ensure that employees from each pool are tested

at equal rates. For example, if pool "A" consists of 50 nonunion employees and pool "B" consists of 50 union employees, the employer must ensure, if testing is done at a 50 percent rate, that 25 tests are conducted annually on employees from each pool.

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Appendix H

Terms and Definitions

Appendix H. Terms and Definitions

Accident

An occurrence associated with the operation of a vehicle if, as a result —

- An individual dies;
- An individual suffers a bodily injury and immediately receives medical treatment away from the scene of the accident;
- With respect to an occurrence in which the mass transit vehicle involved is a bus, electric bus, van, or automobile, or any non-revenue service vehicle, one or more vehicles incurs disabling damage as the result of the occurrence and is transported away from the scene by a tow truck or other vehicle. For purposes of this definition, “disabling damage” means damage that precludes departure of any vehicle from the scene of the occurrence in its usual manner in daylight after simple repairs. Disabling damage includes damage to vehicles that could have been operated but would have been further damaged if so operated, but does not include damage that can be remedied temporarily at the scene of the occurrence without special tools or parts; tire disablement without other damage even if no spare is available; or damage to headlights, taillights, turn signals, horn, or windshield wipers that makes them inoperative;
- With respect to an occurrence in which the mass transit vehicle involved is a railcar, trolley car, trolley bus, or vessel, the mass transit vehicle is removed from revenue service.

Administrator

The Administrator of the Federal Transit Administration or the Administrator's designee.

Air Blank	A reading by an EBT of ambient air containing no alcohol.
Alcohol	The intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols including methyl or isopropyl alcohol.
Alcohol Concentration	The alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by a breath test under this part.
Alcohol Use	The consumption of any beverage, mixture, or preparation, including any medication, containing alcohol.
Aliquot	A portion of a specimen used for testing.
Blind Sample or Blind Performance Test Specimen	A urine specimen submitted to a laboratory for quality control testing purposes, with a fictitious identifier, so that the laboratory cannot distinguish it from employee specimens, and which is spiked with known quantities of specific drugs or which is blank, containing no drugs.
Breath Alcohol Technician (BAT)	An individual who instructs and assists individuals in the alcohol testing process and operates an EBT.
Cancelled or Invalid Test	In drug testing, a drug test that has been declared invalid by a Medical Review Officer. A cancelled test is neither a positive nor a negative test. For purposes of this part, a sample that has been rejected for testing by a laboratory is treated the same as a cancelled test. In alcohol testing, a test that is deemed to be invalid under § 40.81 of this part. It is neither a positive nor a negative test.
Certification	A recipient's written statement, authorized by the organization's governing board or other authorizing official, that the recipient has complied with the provisions of this part.
Chain of Custody	Procedures to account for the integrity of each urine or blood specimen by tracking its handling and storage from point of specimen collection to final disposition. With respect to

Chain of Custody (Continued)

drug testing, these procedures shall require that an appropriate drug testing custody form (see §40.23(a)) be used from time of collection to receipt by the laboratory and that upon receipt by the laboratory (an) appropriate chain of custody form(s) account(s) for the sample aliquots within the laboratory.

Collection Container

A container into which the employee urinates to provide the urine sample used for a drug test.

Collection Site

A place designated by the employer where individuals present themselves for the purpose of providing a specimen of their urine to be analyzed for the presence of drugs.

Collection Site Person

A person who instructs and assists individuals at a collection site and who receives and makes a screening examination of the urine specimen provided by those individuals.

Confirmation (or Confirmatory) Test

In drug testing, a second analytical procedure to identify the presence of a specific drug or metabolite that is independent of the screening test and that uses a different technique and chemical principle from that of the screening test to ensure reliability and accuracy. (Gas chromatography/mass spectrometry [GC/MS] is the only authorized confirmation method for cocaine, marijuana, opiates, amphetamines, and phencyclidine.) In alcohol testing, a second test, following a screening test with a result of 0.02 or greater, that provides quantitative data of alcohol concentration.

Consortium

An entity, including a group or association of employers, operators, recipients, subrecipients, or contractors, that provides drug testing as required by this part, or other DOT drug testing rule, and that acts on behalf of the employer.

Contractor

A person or organization that provides a service for a recipient, subrecipient, employer, or operator consistent with a specific understanding or arrangement. The understanding can be a written contract or an informal

Contractor (Continued)	arrangement that reflects an ongoing relationship between the parties.
Covered Employee	A person, including a volunteer, applicant, or transferee, who performs a safety-sensitive function for an entity subject to this part.
DHHS	The Department of Health and Human Services or any designee of the Secretary, Department of Health and Human Services.
DOT Agency	An agency of the United States Department of Transportation administering regulations related to drug or alcohol testing, including the United States Coast Guard (for drug testing purposes only), the Federal Aviation Administration, the Federal Railroad Administration, the Federal Highway Administration, the Federal Transit Administration, the Research and Special Programs Administration, and the Office of the Secretary.
Drug Metabolite	The specific substance produced when the human body metabolizes a given prohibited drug as it passes through the body and is excreted in urine.
Drug Test	The laboratory analysis of a urine specimen collected in accordance with 49 CFR part 40 and analyzed in a DHHS-approved laboratory.
EBT or Evidential Breath Testing Device	An EBT approved by the National Highway Traffic Safety Administration (NHTSA) for the evidential testing of breath and placed on NHTSA's "Conforming Products List of Evidential Breath Measurement Devices" (CPL).
Education	Efforts that include the display and distribution of informational materials, a community service hot-line telephone number for employee assistance, and the transit entity policy regarding drug use in the workplace.
Employee	An individual designated in a DOT agency regulation as subject to drug testing and/or alcohol testing. As used in this part, "employee" includes an applicant for employment. "Employee" and "individual" or

Employee (Continued)	“individual to be tested” have the same meaning for purposes of this part.
Employee Assistance Program (EAP)	A program provided directly by an employer, or through a contracted service provider, to assist employees in dealing with drug or alcohol dependency and other personal problems. Rehabilitation and reentry to the work force are usually arranged through an EAP.
Employer	A recipient or other entity that provides mass transportation service or which performs a safety-sensitive function for such recipient or other entity. This term includes subrecipients, operators, and contractors.
FTA	Federal Transit Administration
Initial Test (also known as Screening Test)	An immunoassay screen to eliminate “negative” urine specimens from further consolidation.
Large Operator	A recipient or subrecipient primarily operating in an area of 200,000 or more in population.
Medical Review Officer (MRO)	A licensed physician (medical doctor or doctor of osteopathy) responsible for receiving laboratory results generated by an employer’s drug testing program who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual’s confirmed positive test results together with his or her medical history and any other relevant biomedical information.
Operator	A transit entity that is a recipient, directly or indirectly, of Federal funds under Section 3, 9, or 18 of the UMT Act of 1964, as amended, or is a recipient of Federal assistance under Section 103(e)(4) of Title 23 of the United States Code.
Pass a Drug Test	An individual passes a drug test when a Medical Review Officer determines, in accordance with procedures in 49 CFR part 40, that the results of the test:

Pass a Drug Test (Continued)

- Showed no evidence or insufficient evidence of a prohibited drug or drug metabolite
- Showed evidence of a prohibited drug or drug metabolite for which there was a legitimate medical explanation
- Were scientifically insufficient to warrant further action
- Were suspect because of irregularities in the administration of the test, or observation, or custody and control procedures.

Performing a Safety-Sensitive Function

A covered employee is considered to be performing a safety-sensitive function and includes any period in which he or she is actually performing, ready to perform, or immediately available to perform such functions.

Permanent Employee

An employee hired for a period of more than 120 days.

Permanent Record Book

A permanently bound book in which identifying data on each specimen collected at a collection site are permanently recorded in the sequence of collection. May be used in conjunction with a modified urine custody and control form to document collection.

Post-Accident Test

A drug test administered to an employee when an accident (as previously defined) has occurred and the employee performed a safety-sensitive function that either contributed to the accident, or cannot be completely discounted as a contributing factor in the accident.

Pre-Employment Test

A drug test given to an applicant or employee who is being considered for a safety-sensitive position. The applicant or employee must be informed of the purpose for the urine collection prior to actual collection.

Prohibited Drug

Marijuana, cocaine, opiates, amphetamines, or phencyclidine.

Protocol	A procedure requiring strict adherence to achieve scientifically valid test results from specimen collection and laboratory testing of urine specimens.
Qualified Laboratory	A laboratory certified by the DHHS to conduct urine drug testing and which permits unannounced inspections by the recipient, operator, or FTA Administrator.
Railroad	All forms of non-highway ground transportation that run on rails or electromagnetic guideways, including (1) commuter or other short-haul rail passenger service in a metropolitan or suburban area, as well as any commuter rail service that was operated by the Consolidated Rail Corporation as of January 1, 1979, and (2) high-speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads. Such term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation.
Random Test	A drug test annually to a predetermined percentage of employees who perform in safety-sensitive functions and who are selected on a scientifically defensible random and unannounced basis.
Reason to Believe	Objective information indicating that a particular individual may alter or substitute a urine specimen.
Reasonable Cause Test	A drug test given to a current employee who performs in a safety-sensitive position and who is reasonably suspected by two or more (small operators need only one) trained supervisors of using a prohibited drug.
Recipient	An entity receiving Federal financial assistance under Section 3, 9, or 18, of the FT Act, or under Section 103(e)(4) of Title 23 of the United States Code.
Refuse to Submit (to an alcohol test)	A covered employee fails to provide adequate breath for testing without a valid medical

**Refuse to Submit (to an alcohol test)
(Continued)**

explanation after he or she has received notice of the requirement to be tested in accordance with the provisions of this part, or engages in conduct that clearly obstructs the testing process.

Refuse to Submit (to a drug test)

A covered employee fails to provide a urine sample as required by 49 CFR part 40, without a valid medical explanation, after he or she has received notice of the requirement to be tested in accordance with the provisions of this subpart, or engages in conduct that clearly obstructs the testing process.

Return to Duty Test

An initial drug test prior to return to duty and additional unannounced drug tests (for a period up to 60 months) given to employees performing in safety-sensitive functions who previously tested positive to a drug test and are returning to safety-sensitive positions. A return-to-duty test is also required of an individual who has refused another type of test required by the FTA rule.

Revenue Service Vehicle

A vehicle used to transport passengers, including a bus, van, car, railcar, locomotive, trolley car, trolley bus, ferry boat, or a vehicle used on a fixed guideway or inclined plane.

Safety-Sensitive Function

Any of the following duties:

- Operating a revenue service vehicle, including when not in revenue service;
- Operating a non-revenue service vehicle, when required to be operated by a holder of a Commercial Driver's License;
- Controlling dispatch or movement of a revenue service vehicle;
- Maintaining a revenue service vehicle or equipment used in revenue service, unless the recipient receives section 18 funding and contracts out such services;

Safety-Sensitive Function (Continued)

- Carrying a firearm for security purposes.

Safety-Sensitive Position

A duty position or job category that requires the performance of a safety-sensitive function(s).

Screening Test (or initial test)

In drug testing, an immunoassay screen to eliminate "negative" urine specimens from further analysis. In alcohol testing, an analytic procedure to determine whether an employee may have a prohibited concentration of alcohol in a breath specimen.

Secretary

The Secretary of Transportation or the Secretary's designee. The Secretary's designee may be a contractor or other recognized organization that acts on behalf of the Secretary in implementing the DOT and FTA drug use control regulations.

Shipping Container

A container capable of being secured with a tamper-evident seal that is used to transfer one or more urine specimen bottle(s) and associated documentation from the collection site to the laboratory.

Small Operator

A recipient or subrecipient primarily operating in an area of less than 200,000 in population.

Specimen Bottle

The bottle that, after being labeled and sealed, is used to transmit a urine sample to the laboratory.

Split Specimen

An additional specimen collected with the original specimen, to be tested in the event the original specimen tests positive.

Substance Abuse Professional (SAP)

A licensed physician (medical doctor or doctor of osteopathy), or a licensed or certified psychologist, social worker, employee assistance professional, or addiction counselor (certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission), with knowledge of and clinical experience in the diagnosis and treatment of drug- and alcohol-related disorders.

Training	Providing information about the effects and consequences of drug use on personal health, safety, and the work environment; about the work environment; and about the manifestations and behavioral cues that may indicate drug use and abuse.
Vehicle	A bus, electric bus, van, automobile, railcar, trolley car, trolley bus, or vessel. A "mass transit vehicle" is a vehicle used for mass transportation.
Verified Negative (drug test result)	A drug test result reviewed by a Medical Review Officer and determined to have no evidence of prohibited drug use.
Verified Positive (drug test result)	A drug test result reviewed by a Medical Review Officer and determined to have evidence of prohibited drug use.
Violation Rate	The number of covered employees found during random tests to have an alcohol concentration of 0.04 or greater, plus the number of employees who refuse a random test required, divided by the total reported number of employees in the industry given random alcohol tests plus the total reported number of employees in the industry who refuse a random test.
Volunteer	A permanent, temporary, or part-time worker who is not compensated for his/her service and who is included in the requirements of the FTA drug and alcohol regulations.

Appendix I

Regulations

(49 CFR Part 40, 653, 654; Drug-Free Workplace Act)

49 CFR Part 40 (February 15, 1994)

Tuesday
February 15, 1994

Part III

**Department of
Transportation**

**Office of the Secretary
National Highway Traffic Safety
Administration**

**49 CFR Part 40
Procedures for Transportation Workplace
Drug and Alcohol Testing Programs and
Proposed Model Specifications for
Screening Devices To Measure Alcohol in
Bodily Fluids; Final Rule, Proposed Rule,
Notice**

DEPARTMENT OF TRANSPORTATION**Office of the Secretary****49 CFR Part 40**

[Docket 48513]

RIN 2105-AB95

Procedures for Transportation Workplace Drug and Alcohol Testing Programs

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule.

SUMMARY: Under the Omnibus Transportation Employee Testing Act of 1991, the Department of Transportation is required to implement alcohol testing programs in various transportation industries. This rule establishes uniform testing procedures that would be used by all Department of Transportation operating administrations conducting alcohol testing programs under the Act or conducting alcohol testing programs modeled on those required by the Act. This rule also implements changes required by the statute in the Department's drug testing procedures.

DATES: Effective Dates: This rule is effective March 17, 1994, except § 40.25(f)(10)(i)(B), which is effective August 15, 1994. Compliance Date: Compliance with § 40.25(f)(10)(i)(B) is authorized beginning March 17, 1994.

FOR FURTHER INFORMATION CONTACT: Donna Smith, Acting Director, Department of Transportation Office of Drug Enforcement and Program Compliance, 400 7th Street, SW., Washington DC, 20590, room 9404, 202-366-3784; or Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, 400 7th Street, SW., room 10424, 202-366-9306.

SUPPLEMENTARY INFORMATION:**Background**

The Omnibus Transportation Employee Testing Act of 1991, enacted October 28, 1991, directed significant changes in the Department of Transportation's substance abuse-related programs for most transportation industries that the Department regulates. These changes are discussed in detail in the Common Preamble published in today's *Federal Register*. With respect to drug testing procedures, the Act added a requirement for using the "split sample" approach to testing, which Congress believed would provide an additional safeguard for employees. The Act also imposes a variety of requirements for alcohol testing procedures, which this regulation also implements. The Coast Guard is not

amending its existing alcohol testing regulations (33 CFR part 95 and 46 CFR part 4), and will continue to use separate procedures for that testing.

The Department's drug testing procedures, 49 CFR part 40, have governed drug testing under all six operating administration drug testing rules since 1988. Likewise, this rule governs alcohol testing procedures for the five modes affected (the Coast Guard is not covered by the alcohol testing procedures of this part). Under the rule, the existing drug testing procedures become a separate subpart of the regulation, and we are adding new subpart containing the alcohol testing procedures.

Having all the Department's uniform drug and alcohol testing procedures in a single regulation will simplify compliance for covered parties and avoid confusion by permitting all parties to look to one source for information on these issues. This should be particularly helpful to those employers who have employees covered by more than one DOT operating administration. However, employers regulated solely by the Coast Guard should continue to refer to 33 CFR part 95 and 46 CFR part 4 for alcohol testing requirements and procedures.

The Department published the Notice of Proposed Rulemaking (NPRM) for this rule on December 15, 1992, at the same time as the operating administrations (OAs) published their proposed alcohol and, in some cases, drug testing rules. We received over 250 comments to the part 40 docket. In addition, the OAs' dockets received some comments on the testing procedure issues raised by the part 40 NPRM. The Department considered all these comments.

Comments and Responses**Split Sample Procedures for Drug Testing**

This discussion concerns how we will carry out a statutory requirement to use the "split sample" method for collecting and analyzing urine samples for purposes of the Department's drug testing program. The Act requires split samples to be used for testing under the Federal Highway Administration (FHWA), Federal Aviation Administration (FAA), Federal Transit Administration (FTA), and Federal Railroad Administration (FRA) rules.

Mandatory Use of Split Sample Method

The NPRM proposed to implement the statutory requirement for split samples in drug testing by making mandatory the optional split sample

procedure in the existing part 40. The procedure would remain optional under the Research and Special Programs Administration (RSPA) and Coast Guard drug testing rules, which are not affected by the Act. Several commenters wanted the split sample procedure to remain optional in all modes. Because the statute requires the use of split samples in the four OAs mentioned above, the Department cannot adopt this comment. In order to give employers time to prepare to use the split sample collection method, the rule does not require affected employers to begin using this method until 6 months from the date of this rule's publication. Employers, who under the existing rule have the option of using this approach, may begin using the split sample method at any time.

Sample Volume

The NPRM proposed that the total amount of urine collected be 45 ml (30 ml for the primary specimen and 15 ml for the split specimen). The existing rule calls for a 60 ml collection; the Department believed that this was a greater quantity than is needed. Eighteen comments supported the NPRM proposal; two commenters opposed the proposal, one of whom supported collecting 60 ml each for the primary and split specimens. Based on information about laboratory testing needs gained over the course of four years of implementing a drug testing program, the Department is persuaded that 45 ml (30 ml for the primary specimen and 15 ml for the split specimen) is sufficient. This reduction from the current 60 ml minimum should also reduce "shy bladder" situations in which a test is canceled for lack of sufficient specimen volume.

Time Period for Requesting Test of Split Specimen

Another subject of interest to commenters was the time frame in which employees could request a test of a split specimen. The NPRM proposed a 72-hour period, following the employee's being informed of a verified positive test, during which he or she could request a test of the split specimen. Twenty commenters favored this approach, saying that this period was sufficient to allow an employee to make a choice about whether to request the test of the split specimen. Some of these commenters also asserted that allowing the much longer times permitted under some OA regulations (e.g., 60 days) could lead to tests of deteriorated samples and unreasonably postpone employer disciplinary actions. Seven commenters suggested a longer

time frame (e.g., a week, 20 days, 30 days, or 60 days). One of these comments asserted that employees needed a longer time to become aware of their rights, study their options, and seek representation. Three commenters favored a uniform time frame applicable to all OA rules, while one favored allowing each OA to set its own time frame. One commenter asked whether medical review officers (MROs) were required to inform employees of the time period available to request a test of a split specimen.

The Department will adopt, on a uniform basis, the 72-hour time period. The Act requires the Department's procedures to provide for a test of the split specimen "if the individual requests the independent test within 3 days of being advised of the results of the confirmation test." To comply with the statute, the Department is not required to provide a time period longer than 72 hours.

Moreover, the Department has not seen a persuasive rationale for permitting a longer time period. Nothing prevents an employee who is told of a verified positive test from deciding in a very short time to seek a test of the split specimen. For example, some employees testing positive admit that they used drugs. Such employees may well not believe that testing the split specimen is necessary. If the employee concedes that the test was accurate, but contends that the MRO should have verified the test negative based on information concerning legitimate use of a drug, the employee is likely to seek redress other than a test of the split specimen. If, on the other hand, the employee is adamant that he or she never used a prohibited substance, or believes that the laboratory erred, the employee may well seek a test of the split specimen. None of these decisions on the employee's part need take more than 72 hours. Decisions concerning legal options, representation etc. can be made in the time frames appropriate to the processes involved: the decision on whether to seek a test of a split specimen need not wait on a decision about whether or how to make use of a grievance procedure, for example.

By saying that the 72-hour time period for requesting a test of the split specimen is a uniform requirement, we mean that any time an employee makes a request for a split specimen test within 72 hours of being informed of a verified positive test, the split specimen must be tested. Except in the limited circumstances discussed below, employers or MROs are not required by part 40 to provide for a test of a split specimen if the employee makes the

request more than 72 hours after being informed of a verified positive test. There is no information in the rulemaking record to support the need of employees in any particular industry for a longer time period. Nothing in this provision prohibits an employer from voluntarily (e.g., as part of a labor-management agreement) honoring a request for a test of a split specimen made after 72 hours.

The suggestion that MROs inform employees of this time period is a good one. To make the 72-hour period for making a choice on testing a split specimen meaningful, it is necessary to ensure that the employee knows about the timeframe. For this reason, we have added to the final rule a requirement that the MRO notify each employee about this choice. We have inserted parallel language concerning requests for the reanalysis of the primary specimen in situations (i.e., under the Coast Guard and RSPA drug rules) where the split sample collection method is not used.

Under the final rule, when the MRO tells the employee that he or she has a confirmed positive test, the MRO must also tell the employee that he or she will have 72 hours following notice of a verified positive test in which to request a test of the split specimen. This notification is required in all cases of confirmed positive laboratory results, except in those situations in which an employee has effectively waived the opportunity to talk to the MRO. The 72-hour clock does not start to run until the time when the employee is notified, whether by the MRO or the employer, that the test result is a verified positive.

The employee is not required to wait until after a verified positive test in order to request an analysis of the split specimen. An employee could, if he or she chose, ask the MRO at the time of the notification of a confirmed positive test to initiate the test of the split specimen. The MRO would satisfy this request. The verification process would continue, and the MRO would notify the employer of the verified result in the usual way. The verification and notification processes would not be on hold pending the result of the analysis of the split specimen. Such a delay in removing from performance of a safety-sensitive function an individual with a verified positive test could not be justified on safety grounds. Once a test is verified as positive, the employee must be removed from safety-sensitive functions. The employee may not again perform safety-sensitive duties until he or she has met the conditions of the applicable operating administration rule

for return to duty, pending the result of the test of the split specimen.

In any situation in which the MRO does not personally notify the employee of a verified positive test, we advise the MRO, upon receipt of a request from an employee to test the split specimen, to contact the employer or other party for verification of the time the employee was notified of the verified positive test. This should help to avoid potential questions about whether the employee has made a timely request.

In addition, to ensure that employees are not unfairly deprived of the opportunity to request a test of the split specimen, the Department is adding a provision to allow an employee who fails to request this test within 72 hours to present information to the MRO that the failure to make a timely request was caused by circumstances beyond the employee's control. This provision is similar to one in the existing rule concerning an employee's opportunity to convince the MRO that there was a good reason for the employee's failure to contact the MRO for verification purposes (see § 40.33(c)(6)). If the employee persuades the MRO, the MRO would initiate a test of split specimen, even though the employee's request had been made after the 72-hour period ended.

Number of Collection Containers

With respect to the collection itself, the NPRM proposed that the employee provide the specimen into a collection container, which would, in most cases, be subdivided and poured into two separate specimen bottles. One commenter favored the proposed approach; six others said that a two-container, rather than three-container approach, made more sense. That is, in all situations—not just unusual situations, as the NPRM proposed—the employee should urinate into a specimen bottle, which would become one specimen. The collection site person would then pour an amount of the urine from that bottle into a second bottle, which would become the other specimen. Commenters said this approach would save time and money.

The Department believes that these comments have merit, and the final rule permits either approach. The employer could use a collection container with the specimen subdivided and poured into two specimen bottles.

Alternatively, the employer could use a specimen bottle capable of holding at least 60 ml, into which the employer would urinate. The specimen would then be subdivided, with 30 ml being poured into a second specimen bottle, which becomes the primary specimen

for testing purposes. The original specimen bottle, into which the employee had urinated, would become the split specimen.

This latter point may seem counter-intuitive, but there is a reason for it. We want to make sure that there is a 30 ml primary specimen. Pouring 30 ml of the void into the second specimen bottle insures that this will be the case. If the instructions were to pour 15 ml of the void into the second bottle, to be used for the split specimen, the primary specimen might wind up with less than 30 ml of urine if the collection site person overpoured. Laboratories have informed the Department that they intend to provide only 60 ml bottles to collection sites, because of the economies of mass producing a single size container and to avoid confusion by collection site personnel. For this reason, the final rule's procedure should not result in extra costs.

Storage of Split Specimens

Three commenters recommended that employers be authorized to store split specimens at the collection site rather than send them to the laboratory, in order to reduce shipping costs. The Department is not adopting this suggestion. Generally, laboratories have better, more secure storage facilities than many collection sites. The chances of loss, deterioration, tampering, etc. of a specimen are likely to increase in non-laboratory locations. A uniform procedure for storage and re-shipment of split specimens is likely to reduce opportunities for error in the system. The rule also addresses the issue of how long the split specimen should remain in storage. As noted above, the employee must notify the MRO within 72 hours of being informed of a verified positive test to trigger a requirement for a test of the split specimen.

Consequently, it is not necessary for the laboratory to retain the split specimen for a prolonged period. In the Department's view, it is sufficient to require the split specimen to be stored 60 days from the date it arrives at the laboratory, if a request for testing it has not been received. (The primary specimen would remain in storage for one year, as under the existing rule.)

Choice of Alcohol Testing Methods and Devices

NPRM Proposal

The NPRM for alcohol testing procedures proposed that both the initial and confirmation tests would be done on an evidential breath testing device (EBT). An EBT is a breath testing device that is on the National Highway

Traffic Safety Administration's (NHTSA) Conforming Products List (CPL), a list of breath testing devices that NHTSA has approved for use by law enforcement agencies in drunk driving cases. In addition, the EBTs would have to print out results and assign a sequential number to tests, to ensure that test results were preserved in a way that minimized the chances for human error or collusion (e.g., the disregarding of an initial positive test by an employer who did not want to lose an employee's services).

The NPRM also proposed training requirements for breath alcohol technicians (BATs), who would administer the tests, and maintenance and calibration requirements for EBTs. In requiring EBTs for all testing, DOT proposed that other testing methods—blood, saliva, urine, non-evidential breath, performance testing—could not be used for either screening or confirmation tests. In summary, the Department made this proposal because EBTs are a well-established, reliable, and accurate testing method; EBTs are minimally intrusive; EBTs can provide an on-the-spot result that allows employers to take action that prevents potential safety risks; and EBTs can produce a printed record of the test result that will prevent disputes about the accuracy and integrity of the testing process.

Comments

Overview

This proposal generated more comments than any other feature of the NPRM. Approximately 190 of the comments to part 40 addressed some aspect of testing methodology. These comments came from a variety of sources, including employers in all the industries covered by the proposed regulations, unions, laboratories, manufacturers of testing equipment and products, and consortia and third-party testing service providers. The most consistent theme among comments on this subject was a desire for greater flexibility in the choice of testing methodology than the NPRM proposed.

Support for NPRM Proposal

Twenty-six comments, representing employers in several industries, unions, third-party testing services, manufacturers of breath testing equipment, state police agencies, and the National Transportation Safety Board, supported the NPRM proposal. They cited as reasons for their support the non-invasiveness of breath testing, its long acceptance by courts and employees, its provision of a

quantitative readout, simplicity compared to blood or urine testing, and the relatively low operating costs involved. Some of these commenters qualified their support of the NPRM proposal by saying that breath testing, while a good method, should be one of an array of options available to employers, or required only for certain types of testing (e.g., pre-employment and random) where the employer has control over the time and place of testing.

Concerns About Cost of NPRM Proposal

Eighty commenters, representing principally employers in all the regulated industries, third-party testing service providers, and manufacturers of other testing devices that compete with EBTs, said using EBTs for both screening and confirmation tests was too expensive. They quoted capital costs per EBT between \$2–10 thousand (some EBT manufacturers who commented agreed with the lower end of this range). This cost would be multiplied, they believe, by a need to obtain EBTs for all the locations in which employers operate. For example, a trucking association cited a motor carrier that would have to buy an EBT for each of its 600 locations, at an estimated cost of \$1.2 million. In addition, there would be BAT training, maintenance, and calibration costs. Commenters who talked in cost per test terms cited estimates of between \$20–100 per test, which they said was much higher than for competing methods. Railroad industry employers (who now use breath testing for alcohol) said that, to reduce capital costs, EBTs should not be required to have the sequential numbering and printout capabilities proposed in the NPRM (which they said would add \$1500 to the cost of an EBT).

Concerns About Difficulty in Implementing NPRM Proposal

Some commenters feared that there would be insufficient numbers of EBTs, BATs, and testing sites available to implement the proposal. There would be a rapid expansion of the need for EBTs (one commenter estimated a 3000–4000 percent increase in the market) that manufacturers may be unable to fulfill, as well as a rapid training need for thousands of BATs that would take substantial time to meet. Seventeen commenters (including a number of third-party service providers and employers) said that the cost of obtaining EBTs and training BATs, the unfamiliarity of many third-party testing sites with breath testing, and liability concerns would deter many potential third-party service providers from

participating. This would particularly be a problem in small towns and rural areas, where the low volume of testing would make the needed investment too costly.

Concern About Confrontations

Twenty-eight commenters (principally third-party service providers and employers) expressed concern about the possibility of confrontations between BATs and employees. These confrontations would occur, commenters said, because the BAT—not an employer representative with supervisory authority over the employee—would be the messenger of bad news about a test result. Several commenters cited the image of a 90-pound female BAT having to deal with an angry (and perhaps intoxicated) 300-pound truck driver who had just been told he had failed an alcohol test.

Other Comments About NPRM Proposal

Commenters expressed other concerns about the EBT-EBT approach. Some found the process too time-consuming. Others pointed out that the collection site is commonly recognized as the weak point of the drug testing process, and that conducting the alcohol testing process there increased the chance of error. Other comments said that there were too many opportunities for human and mechanical error in the breath testing process, which, together with what they regarded as the unreliability of EBTs at low alcohol concentrations, created numerous opportunities for litigation. Some commenters also said that, if all screening and confirmation testing were done on EBTs, the two tests should be run on different machines.

Legal Issues

Several commenters raised legal challenges to the proposal. Nine commenters (primarily manufacturers of competing devices and unions) said that the statute requires split samples (i.e., the subdivision and retention of a portion of a sample for an additional test at a laboratory as a safeguard for the accuracy of the process) in all cases. Generally, EBTs do not retain breath samples. Therefore, these comments said, methods that permitted split samples (e.g., blood, urine, saliva) must be used. Thirty-one comments said that the statute contemplated the use of different methods for the screening and confirmation test, respectively. Eleven comments said that, since the results of EBT tests would be used to refer persons for rehabilitation or treatment, they would be considered medical devices subject to Department of Health and Human Services (DHHS) regulation.

Since DHHS had not approved EBTs as medical devices, their use could be blocked.

Desire for More Flexibility

Seventy-five commenters (representing a wide variety of equipment manufacturers, employers, and third-party service providers) favored allowing employers to choose the best testing method for them. In addition to the virtue of flexibility, this approach would permit each employer to choose the most cost-effective method of compliance in its own circumstances.

Most of these commenters appeared to favor testing methods that would use two different testing methods (e.g., non-evidential breath or saliva screening test, blood test for confirmation). Ten commenters disagreed on this point, saying that non-evidential screening tests should never be permitted. Their primary concern was about the accuracy of these testing methods. Several commenters who favored using non-evidential screening tests conceded that it would probably be necessary to suspend an employee's performance of safety sensitive functions pending a confirmation test of a positive non-evidential screening test. Most commenters who addressed confirmation procedures in a two-method system said that confirmation tests (of whatever body fluid) should be done on GC (gas chromatography, the same highly accurate method used for confirmation tests under the drug testing program).

Specific Comments on Other Testing Methods

Non-Evidential Breath Testing Devices

(e.g., tubes filled with materials that turn a certain color when alcohol-laden breath is blown into them or small, hand-held electronic devices that register the presence or absence of alcohol concentration in breath)

Twenty-nine commenters, including a variety of employers and manufacturers of the devices, supported using non-evidential breath testing devices. Most commenters cited cost (estimated at between \$90–\$550 for various models of non-evidential breath testing machines, and about \$2–4 each for disposable devices) and convenience as reasons. A few opponents of non-evidential breath testing devices said their accuracy was questionable, both with respect to false positives and false negatives.

Saliva Testing

(i.e., a device which registers a particular alcohol concentration when a

swab with saliva from the employee's mouth is inserted into it)

Forty-five commenters favored the use of saliva testing. These commenters included a variety of employers, third-party service providers, equipment manufacturers, and others. Commenters claimed several advantages for use of screening saliva tests: modest cost (estimated at between \$5–20 per test); simplicity of use, little need for training; existing "approvals" from NHTSA and Food and Drug Administration (FDA) for some devices (though in contexts other than a workplace testing program); non-invasive nature of the devices; sufficient accuracy for screening tests. Two commenters also said that, while it was most typical to use blood testing for confirmation after a saliva screen, saliva specimens could also be used for confirmation, as laboratories could run a gas chromatography analysis on saliva.

A few commenters expressed concerns about saliva testing devices. A union provided data that it said showed that saliva devices had a mixed record for accuracy. Other commenters said saliva remained an unproven method, that saliva devices were not ethanol-specific, and that saliva alcohol and blood alcohol results may differ. Proponents of saliva testing devices conceded that chain of custody forms would be needed and that there was no method of automatically generating permanent records of test results that positively identified a particular employee with a particular result. They said that keeping paper records was adequate for this purpose, however

Blood Testing

Forty-eight commenters (again representing a variety of employers, plus third-party providers, laboratories and others) favored allowing the use of blood testing as a confirmation test method. The advantages cited for this method included well-established scientific and legal acceptance for accuracy, the availability almost anywhere of technicians trained in drawing blood, and utility for post-accident testing on employees who are unconscious. Some of these commenters said that, while blood testing is admittedly more invasive than other methods, employees accept it because of its reputation for accuracy. Also, they said, the low expected positive rates on screening tests will mean that few blood confirmation tests would have to be performed. Commenters estimated costs to be in the \$20–60 range per test.

Seven commenters opposed the use of blood testing, primarily on the ground that it is too invasive. In addition, a few commenters said that DHHS or DOT

would have to develop laboratory certification standards for blood testing. Some comments said that employees might have to be required to "stand down" during the interval between the blood collection and the return of the test result from the laboratory.

Urine Testing

Eight commenters favored allowing the use of urine testing, including some employers who now use this approach to their satisfaction and laboratories that do urine testing. One advantage cited for this approach is that alcohol could simply be added to the list of substances for which urine samples taken for drug testing are tested, at a low incremental cost. Commenters said that DOT or DHHS should develop laboratory certification procedures and cutoff levels. Some commenters also noted that detailed collection procedures would have to be developed, since urine testing for alcohol is more complicated than urine testing for drugs (e.g., two voids, twenty minutes apart, are recommended to measure alcohol concentration in urine).

Performance Testing

Five commenters, most of whom were manufacturers of the devices, supported the use of performance tests for the screening or screening test. (A performance test does not measure alcohol concentration; it measures deviations from a personal norm of reaction time, motor coordination, etc.) One commenter opposed performance testing devices as inappropriate for this program.

Responses to Comments on Testing Methods

Legal Issues

The Act provides, with respect to confirmation testing, that all tests * * * shall be confirmed by a scientifically recognized method of testing capable of providing quantitative data regarding alcohol * * *

Some comments asserted that this provision requires that a different testing method be used for the screen and confirmation tests, respectively. The statute says no such thing, stating only that the confirmation test must use a "scientifically recognized" method that can provide "quantitative data" regarding alcohol. As long as the method of confirmation meets these criteria, the statutory requirement is satisfied. Breath testing is scientifically and legally recognized as a method for accurately testing alcohol concentration, and devices meeting the Department's requirements provide quantitative data.

(Blood testing, of course, also meets the statutory criteria.)

The ability of a method of confirmation testing to pass these statutory tests is not dependent on the choice of a method of screening testing. Testing of breath for confirmation, as provided in this rule, is equally valid under the statute whether evidential breath testing, non-evidential breath testing, or saliva is used for the screening test. Testing of blood for confirmation is equally valid under the statute whether blood, breath, saliva or urine is used for the screening test. All that matters is that the confirmation testing method meet the statutory criteria in its own right.

With respect to split samples, the Act requires the Department's regulations to provide that each specimen sample be subdivided * * * and that a portion thereof be retained in a secure manner to prevent the possibility of tampering, so that in the event the individual's confirmation tests results are positive the individual has an opportunity to have the retained portion assayed by a confirmation test done independently at a second certified laboratory if the individual requests the independent test within 3 days after being advised of the result of the confirmation test * * *

Some commenters asserted that this language should be read to require that split samples be used in all alcohol testing, with the implication that a method that did not permit the use of split samples could not be used. Since most EBTs—including those proposed by the Department in the NPRM—do not retain a sample that could theoretically be subdivided and preserved for testing of a split specimen, some of these commenters asserted not only that blood or other liquid-based testing methods were required, but that breath testing was prohibited.

This interpretation is flatly contrary to the statute, which specifically contemplates the use of breath testing (see, e.g., sec. 3(a) of the Act, adding section 614(d)(6) to the Federal Aviation Act). Breath testing is a well-recognized form of alcohol testing, and there is no evidence that Congress had any intention of prohibiting its use, either indirectly by requiring split samples or otherwise. The legislative history makes clear that the Senate sponsors of the legislation intended that breath testing be used and that split samples were not mandated for breath testing. In the floor debate, during a colloquy between Senators Danforth and Hollings, Senator Hollings stated

[t]here are also requirements for split samples, primarily included in the legislation

to allow urine samples to be retested. DOT would have the authority to determine that blood samples should be similarly handled. This specific requirement is not relevant in the case of breath testing for alcohol, but DOT is directed by this legislation to provide necessary safeguards in this area to ensure the validity of test results.

137 Cong. Rec S 14764, 14770.

There is also internal evidence in the wording of the statutory provision that supports the reasonable interpretation that the split sample requirement is intended to apply to liquid body fluids like urine and blood, but not to breath. The statute uses the word "samples" in ways that refer primarily to samples of liquid body fluids. For example, section 614(d)(1) of the amended Federal Aviation Act refers to the need for "privacy in the collection of specimen samples." Privacy is very important with respect to collection of urine samples for drug testing. Because elimination functions are not involved, privacy is not as important in breath collections. In paragraph (d)(6) of the same section, the statute refers to detecting and quantifying "alcohol in breath and body fluid samples, including urine and blood." In this language, the phrase "including urine and blood" is best understood as modifying "body fluid samples," as opposed to "breath." Given the way that the term "sample" is used in these portions of the statute, the use in paragraph (d)(5) of "sample" should also be used to refer to liquid body fluid samples (i.e., urine and blood). When this paragraph speaks of the "specimen sample be[ing] subdivided," then, it is imposing a split sample requirement on blood and urine, not on breath.

Some commenters argued that the language mentioned above from paragraph (d)(6), requiring the Department to "ensure appropriate safeguards for testing to detect and quantify alcohol in breath and body fluid samples, including urine and blood * * *," creates a right for employees to have a screening test confirmed by blood testing. This language, on its face, does not create such a requirement, since it does not specify any particular sort of test for either screening or confirmation purposes. There is ambiguous legislative history on the point, with the Senate report on the Act saying both that "an employee testing positive for alcohol using a specimen other than blood shall be entitled, at that employees [sic] option, to a blood test" and that "the Committee has not specified the type of test to be used in either the screening or confirmation test." Given that the statute does not explicitly require blood

testing for confirmation, and that the portion of the statute that mandates confirmation testing requires only a "scientifically recognized" confirmation test that can produce "quantitative data" (criteria that breath testing clearly meets), the Department does not believe it would be reasonable to view this ambiguous legislative history as a mandate for the availability of blood confirmation testing in all cases.

The Department does not believe that regulations of the Food and Drug Administration (FDA) would interfere with the implementation of breath testing under this rule. FDA does regulate the safety, labeling, etc. of medical devices. It is our understanding that FDA may be considering initiatives to regulate EBTs used as medical devices in medical settings. FDA does not, however, regulate or certify the precision or accuracy of EBTs that are currently used for law enforcement purposes or that would be used under the DOT alcohol testing program. (These would not be viewed as medical devices used in medical settings.) We believe that current FDA rules are, and future FDA rules would be, consistent with NHTSA certification of EBTs.

Flexibility and Cost

Many commenters made flexibility in testing methods a high priority. The Department agrees that flexibility is desirable. However, the Department also believes that any testing system should meet a series of criteria, each of which is necessary to execute the statute faithfully and to ensure that the safety and accuracy goals of the program are met. The Department cannot emphasize too strongly the importance of ensuring accuracy and reliability of testing devices and methods, at both the screening and confirmation test stages. This is needed, among other reasons, to protect employees from even temporarily being identified as misusers of alcohol. In the context of drug testing litigation, the courts, in upholding the Department's program, relied to a substantial extent on the reliability and accuracy safeguards in that program.

Within these constraints, our objective is to provide maximum flexibility and minimum cost. The Department's criteria for carrying out its objectives in this area are the following:

- As required by the statute, the method used for confirmation should be scientifically recognized and able to produce a quantitative result. The method should meet NHTSA Conforming Products List (CPL) standards at 0.02 and higher alcohol concentrations.

- The confirmation method should be alcohol-specific (i.e., does not produce a reading for acetone).

- The confirmation method should generally provide documentation of quality control/calibration and be admissible as forensic evidence in administrative proceedings.

- The testing method used for confirmation should provide a result at the time and place of the test, so that an employee whose continued performance of a safety sensitive function may present a safety risk can be removed from performing that function.

- The testing method used for the screening test should minimize the occurrence of false positives and false negatives and should meet stringent standards for precision and accuracy (e.g., $\pm .005$ at 0.02 alcohol concentration).

- The testing method used for screening tests should provide a result at the time and place of the test and be specific for measuring alcohol concentration.

- The testing methods used for confirmation tests should provide a printed, permanent record of the test number and test result, in order to avoid uncertainty about whether this employee took this test with this result. The testing methods used for screening tests should provide either this kind of record or be used in conjunction with procedures that provide a record of the test result linked to the individual tested through some form of permanent documentation. The purpose of this criterion is to prevent collusion and cheating.

- The testing methods used for screening and confirmation tests should, as a policy matter, be as non-invasive as possible.

At the present time, only evidential breath testing methods meet all these criteria for screening and confirmation tests. Applying these criteria strictly would result in a final rule that, like the NPRM, permitted only evidential breath testing for both tests. The points made by commenters favoring the NPRM approach further support using evidential breath testing for both tests.

The Department, to achieve a reasonable balance between the legal and policy goals on which the criteria are based and commenters' desire for greater flexibility, is modifying the approach proposed in the NPRM. First, the final rule will permit EBTs that are on the NHTSA CPL, but that do not meet the additional requirements for confirmation EBTs (e.g., sequential numbering and print-out capability), to be used for any screening test. While these EBTs may be used for screening

tests at this time, because NHTSA has determined them to meet appropriate accuracy and precision standards, non-evidential breath screening devices (e.g., "breath tubes") may not be used at this time.

Second, in an NPRM published in today's Federal Register, the Department will propose to permit blood testing to be used in limited circumstances. In the case of a reasonable suspicion test or a post-accident test, where an EBT meeting the requirements of part 40 is not readily available, the employer could use blood testing for the confirmation test. Blood alcohol testing would also be available as an option in "shy lung" situations. This NPRM also proposes blood testing procedures to be used in these circumstances. The rationale for allowing this limited use of blood testing is discussed in the preamble to the NPRM.

Third, the Department is also publishing in today's Federal Register a notice proposing to adopt criteria and procedures that would permit additional alcohol screening devices to be used for screening tests in the program. This proposal would be intended to result in the adoption of model specifications for a conforming products list for alcohol screening devices. Under this proposal, manufacturers of devices could submit their products to DOT for evaluation and, if their devices met the model specifications, the Department would authorize their use as screening devices in DOT-mandated alcohol testing. This approach will permit greater flexibility in the use of screening devices that are not now appropriate for use, including those supported by their manufacturers and others in comments to the part 40 docket, if they are able to meet DOT model specifications.

With respect to costs, commenters had three basic concerns. First, commenters believed that EBTs meeting all the NPRM's requirements would be too expensive. Some commenters believed that adding features such as a sequential numbering and printout capability would add considerably to the cost of the devices. The Department's information, included in our regulatory evaluations, and based on data obtained from manufacturers, suggests that the list price per unit of an EBT meeting all the NPRM criteria for use in confirmation tests is about \$2000. (There are some indications that prices may be lower for purchases in quantity.) There are other EBTs on the CPL, available under the final rule to be used for screening tests, that list for about

\$1000, again with the possibility of lower prices for purchases in quantity.

Because the Department is proposing to permit blood testing in post-accident and reasonable suspicion situations where a breath testing unit is not readily available, the numbers of EBTs that any employer would have to obtain may be reduced significantly from earlier estimates, lowering many commenters' estimated capital costs of the program. This is because employers would not have to provide an EBT at all its work sites against the contingency of a reasonable suspicion or post-accident test happening there, as a number of employers' estimates assumed. Commenters identified having to pre-position EBTs at all work sites, even the small and remote ones, as a major cost of compliance with the NPRM (even though the NPRM would not have imposed this requirement). In addition making blood testing available means that the time workers would be held out of service pending a test would be reduced significantly, resulting in further savings. We refer commenters to today's NPRM on blood alcohol testing for further information.

Second, commenters expressed concern about the costs of training personnel and maintaining and calibrating the instruments. While training can be expensive, we believe that these costs are difficult to avoid if the accuracy and integrity of the testing program are to be protected. As other devices are approved under the Department's forthcoming procedures, employers will have the opportunity to determine if use of other methods will reduce their overall costs.

Third, some commenters (especially from the railroad industry) who already use EBTs expressed concern about the costs of the additional features that the NPRM would have required (e.g., sequential numbering capacity, print-out capability). The final rule responds to these concerns by allowing EBTs without these features to be used for screening purposes. A railroad could use its existing EBTs (assuming they are on the NHTSA CPL) for screening tests, while obtaining only as many of the machines with the additional features as it needed for confirmation testing. This would reduce the additional costs that these employers would have to incur.

When the Department issues a broad mandate for employee testing, the overall effect is likely to be the creation of additional opportunities for professionals, manufacturers, and other businesses to serve the markets created by the DOT requirements. These opportunities can fairly be expected to lead to an influx of participants into the

market. There is ample evidence that this has been the case in the Department's drug testing program, and it is reasonable to expect that similar economic opportunities will draw businesses and professionals into the alcohol testing market. The Department believes that this factor is likely to outweigh, by a substantial margin, any deterrent effects on participation in the program related to equipment or training costs, the newness of the procedures, liability, or the willingness of businesses and professionals to participate.

Comments that potential participants would be deterred for these reasons were, for the most part, speculative. Given the market's response to the drug testing rules since 1988, it is fairer to assume that the market's response to the even larger-scale alcohol testing program will not be timid. With respect to the issue of sufficient EBTs being available, the Department has contacted EBT manufacturers, and we do not anticipate any serious shortage of devices as the program begins operation. If, at any time, the Department learns that there are inadequate supplies, the Department could postpone or otherwise modify its rules.

While the image of a large, angry, intoxicated employee confronting a 90-pound female BAT over a positive result is a graphic one, the speculation and spotty anecdotal evidence provided by commenters to back up their concern on this matter is not sufficient to cause the Department to retreat from its position that immediate results are needed. (This concern goes to any testing method that provides an immediate result, not just to breath testing. It might appear even more strongly in a situation in which an individual is told, as the result of a non-evidential screen, that he is to "stand down" and not work for three days while a laboratory test result is obtained.)

The point of getting an immediate result is safety: if an employee, of whatever size, has a higher alcohol concentration than the Department's rules permit, the individual should not be performing a safety-sensitive function. In the interest of safety, we need to stop the individual's performance of that function now, not two or three days later when a laboratory test result becomes available. We also want to prevent the unnecessary cost of holding an employee out of service for two or three days pending laboratory results following a non-evidential screen. BATs are not given the responsibility of taking a driver's keys away. The DOT alcohol testing form includes a statement, to be

signed by the employee, that persons who test positive should not drive or perform other safety-sensitive functions. Employers have a responsibility, as part of their alcohol education for employees, to emphasize that employees must cease performing safety sensitive functions if they test positive.

The Department does not believe that it is necessary to use two separate EBTs in order to have a valid, defensible result. EBTs on the NHTSA CPL are designed for accuracy, and the internal and external calibration checks built into the Department's procedures are sufficient insurance against error. (Where employers choose to use an EBT without the additional features for screening tests, of course, the employer will necessarily use a different machine for the confirmation test.) The Department is convinced that EBTs meeting its requirements are sufficiently accurate and reliable, at the alcohol concentrations that will be tested for, and that excessive invalidations of tests or successful lawsuits or grievances will not occur. Similarly, the likelihood of extensive errors by testing personnel should be diminished by the BAT training requirements.

Manufacturers of alternative testing devices, and some other commenters as well, advocated various other methods of testing, particularly for screening tests. As noted above, the Department intends to take action that could result in decisions to authorize use of other screening devices and to authorize the use of blood testing in some circumstances. The Department has decided not to permit the use of these alternative methods until they can meet the criteria we believe are necessary for accurate testing meeting the requirements of the statute. The following paragraphs summarize the Department's reasons for not permitting the use, at this time, of other testing methods:

Blood Testing

- This is the most invasive form of testing.
- Employees may fear needles or fear infection from improper medical procedures.
- Additional collection procedures, chain of custody procedures, and equipment requirements would be needed, making regulatory requirements more complex.
- Laboratory certification standards and testing protocols would need to be established. As noted in the accompanying NPRM, this poses potentially significant problems even in the limited context in which the Department is proposing to permit the use of blood testing.
- Results would not be available for at least 24 hours, and could take 3-4 days to arrive. Confirmed results would, therefore, not be available at the time the employee was

affected by alcohol, which would reduce the safety benefits of the program.

Urine Testing

- Present laboratory certification standards and testing protocols do not cover urine testing for alcohol. There would have to be additional laboratory certification procedures and testing protocols developed for urine testing.

- Urine testing for alcohol (as distinct from drugs) requires a complex collection process, involving two separate voids with an interval between them. Addition of a preservative to prevent the creation of alcohol by microbial fermentation is also recommended. We would need to add new collection procedures to accommodate these requirements, as well as new training requirements for collection site personnel. These additional procedures would make the collection process more complex and multiply the chances for errors.

- Urine testing is regarded as the least accurate method currently available for determining the amount of alcohol in the body.

- A blood to urine ratio has not been definitively established, making it difficult to equate a urine test result for alcohol to a particular blood or breath alcohol level.

- There are greater costs of employee "downtime," for transporting the employee to a collection site for testing and for the longer collection procedure.

- Testing of urine specimens would have to take place in a laboratory. Results would not be available for at least 24 hours, and could take 3–4 days to arrive. Confirmed results would, therefore, not be available at the time the employee was affected by alcohol, which would reduce the safety benefits of the program.

Saliva Testing

- Especially at low alcohol levels, saliva devices are likely to have a higher rate of false positives and negatives than EBTs on the CPL.

- Some saliva devices do not provide quantitative results.

- Because saliva screening testing devices are disposable, and do not generate a record of the test, ascertaining whether a particular employee took a particular test and had a particular result, or that the test took place at all, would be difficult. (The use of a log book, which helps to address this concern where EBTs without sequential numbering or printout capabilities are used, would be difficult in the case of disposable devices. The log book would accompany the EBT wherever it went, which would not be possible with disposable devices.)

- There are different saliva-based technologies, each requiring the establishment of criteria for accuracy, reliability, etc. Until NHTSA criteria are established for these technologies, it is premature to permit their use in the DOT program.

- If laboratory confirmation methods (e.g., blood) are used in combination with saliva screens, confirmation results would not be available for at least 24 hours, and could take 3–4 days to arrive. Confirmed results would,

therefore, not be available at the time the employee was affected by alcohol, which would reduce the safety benefits of the program. If breath testing confirmation is used, cost savings claimed for the use of disposable devices over the use of breath testing for both screening and confirmation testing would be reduced substantially.

- The Department would have to establish additional procedures, training requirements, quality control requirements, etc. for saliva testing, adding further complexity to the program.

Non-evidential Breath Testing

- Non-evidential breath devices (i.e., disposable devices and others not on the CPL) have a higher rate of false positives and negatives than evidential EBTs.

- Non-evidential breath screening testing devices do not generate a record of the test, so that ascertaining whether a particular employee took a particular test and had a particular result, or that the test took place at all, would be difficult. (The use of a log book, which helps to address this concern where EBTs without sequential numbering or printout capabilities are used, would be difficult in the case of disposable devices. The log book would accompany the EBT wherever it went, which would not be possible with disposable devices.)

- If laboratory confirmation methods (e.g., blood) are used in combination with non-evidential breath screens, confirmation results would not be available for at least 24 hours, and could take 3–4 days to arrive. Confirmed results would, therefore, not be available at the time the employee was affected by alcohol, which would reduce the safety benefits of the program. If breath testing confirmation is used, cost savings claimed for the use of non-evidential devices over the use of evidential breath testing for both screening and confirmation testing would be reduced substantially.

- Non-evidential EBTs on the market appear to vary greatly in type of technology used, quality, and accuracy. Until NHTSA criteria are established for these devices, it is premature to permit their use in the DOT program.

- The Department would have to establish additional procedures, training requirements, quality control requirements, etc. for non-evidential breath testing, adding further complexity to the program.

Performance Testing

- The statute requires testing for alcohol concentration, not diminished performance. A test for performance appears not to meet this statutory requirement.

- Performance tests are very unspecific, which could result in positives caused by a wide variety of things other than alcohol use (e.g., illness, prescription or over-the-counter medication, fatigue, emotional distress). This would lead to many unnecessary confirmation tests and could result in employees being taken off the job while awaiting confirmation test results, adding extra costs for employers and employees.

- The accuracy of many performance testing devices is unproven.

- Many performance testing devices do not generate a record of the test. Ascertaining

whether a particular employee took a particular test and had a particular result, or that the test took place at all, could be difficult.

- Most performance testing devices require the establishment of individual baseline data for each employee, which can be a time-consuming and costly procedure.

- In many systems, performance evaluation must relate to critical job skills, measures of which have not been established for many occupations.

- Performance testing devices or systems on the market appear to vary greatly in quality and accuracy. Until NHTSA criteria are established for these devices, it is premature to permit their use in the DOT program.

- The Department would have to establish additional procedures, training requirements, quality control requirements, etc. for performance testing, adding further complexity to the program.

This discussion is in the context of an extensive, multi-modal testing program, including pre-employment and random testing as well as reasonable suspicion and post-accident testing. Greater protections are needed in such a program, particularly in the absence of procedural protections present in some existing programs that may use non-evidential testing in some circumstances. For example, the Coast Guard post-accident alcohol testing program can involve administrative proceedings in which the employee has the opportunity to challenge test results before a license is revoked or an investigative inquiry at which further evidence could be introduced.

Breath Alcohol Technicians

The NPRM proposed that breath alcohol technicians (BATs) be trained to proficiency in using EBTs and in DOT alcohol testing procedures, using a NHTSA- or state-approved course. The competence of the BAT would have to be documented. Additional (i.e., refresher) training would be required, as needed, to maintain proficiency. An employee's supervisor could not act as the BAT for that employee unless allowed by a DOT rule and no other qualified BAT were available.

Commenters spoke to several provisions of this section. Six commenters favored, and 15 opposed, requiring BATs to be tested to ensure that they are alcohol free (an issue about which the Department had asked a question in the NPRM preamble). A number of the opponents said that this issue should be decided by the BATs' employers. The Department is not adopting this idea, which we believe to be unnecessary to the program.

Forty-nine comments addressed the training and qualification of BATs. All these commenters favored training,

though two mentioned that training might be very costly or difficult, especially for smaller companies. Sixteen comments said that it was not necessary for the regulation to specify that BATs be trained in the pharmacology and physiology of alcohol, about which the NPRM preamble had asked a question. Three commenters took the opposite position. The Department agrees that this training is not needed for BATs, whose training should be focused on the proper operation of testing devices.

Seventeen commenters supported the NPRM approach (including the concept of "training to proficiency"), while two thought the NPRM too vague. Eleven favored specific numbers of hours of training, ranging from 4 to 40, with most of the comments suggesting something between 4 and 8 hours. Two expressed support of recurrent training, one asking for a more specific requirement than the NPRM proposed. The Department believes it is most relevant to ensure the BATs' proficiency. Our goal is to ensure that BATs are able to use the testing devices that they will operate. The Department believes that the best way to make sure that BAT training results in proficient operators is to require that BAT training include a course that is equivalent to the DOT Model Course. Courses followed by state law enforcement agencies and other organizations appear to vary substantially from one another, and may be focused on breath testing in other contexts (e.g., enforcement of DUI laws). NHTSA will review training courses and issue determinations concerning whether they are equivalent to the NHTSA Model Course.

Who should be a BAT? Twenty-two of 23 commenters supported permitting a trained law enforcement officer to act as a BAT. The Department agrees that it is appropriate to authorize trained law enforcement officers to act as BATs (e.g., off-duty officers under contract to an employer), as long as they have been certified by a state or local law enforcement agency. The officers would have to follow DOT testing requirements, including this part, and to be certified to operate the EBT used in the DOT-mandated test. The officers could perform any type of DOT test. Except for the FHWA rule, the OA rules do not permit the substitution of law enforcement tests for tests conducted under DOT procedures.

There was less consensus on the issue of supervisors as BATs. Sixteen commenters favored allowing properly trained supervisors to act as BATs, pointing out that, particularly in reasonable suspicion or post-accident

testing, or at remote sites, supervisors may be the most readily available, or perhaps the only available, trained BATs. Eleven other commenters disagreed, most saying that an employee's supervisor should never be the employee's BAT. These commenters appeared concerned about the appearance or reality of a conflict of interest between the supervisor's managerial role and his objectivity as a BAT. The Department believes that, when possible, someone other than an employer's supervisor must act as a BAT for the employee's test. However, a supervisory BAT is better than no BAT at all. To enable a test to go forward when no other BAT is available in a timely manner, the Department will permit a BAT-trained supervisor to conduct the test. However, if a DOT operating administration regulation prohibits the use of a supervisor in this role (e.g., in reasonable suspicion testing), the supervisor may not act as the BAT even in this circumstance.

EBT Technology

The NPRM required EBTs used for screening and confirmation testing to be on the NHTSA CPL, have the capacity to print out triplicate (or three consecutive identical) results, assign a sequential number to each test, distinguish alcohol from acetone at the 0.02 alcohol concentration level, and have the capability for performing both air blanks and external calibration checks. Commenters addressed a number of points concerning EBT technology.

Some commenters pointed to what they viewed as shortcomings of the CPL itself, particularly that it did not require EBTs to be accurate at the 0.02 level. This was true of the CPL at the time the NPRMs were issued; however, NHTSA has since modified the model specifications for the CPL to require accuracy and precision at the 0.02 level. Other commenters said that since inclusion on the CPL is based on testing of a prototype, rather than testing of each device, the CPL was an inadequate assurance of accuracy. The final rule does not rely on the CPL alone to ensure accuracy, however. The rule requires there to be a quality assurance plan (QAP) for the instrument as well as air blanks and external calibration checks.

As noted above, a number of commenters criticized the requirement for printing results and sequential numbering capability, saying that these features were unnecessarily costly. Any device on the CPL should be able to be used, one of these commenters said. The final rule responds to these comments by allowing any device on the CPL to be

used for screening tests, with the additional features required only on those machines used for confirmation testing. This should reduce the number of the more expensive models employers will have to obtain.

Some commenters expressed concern about radio frequency interference (RFI) affecting the results of some types of EBTs. The concern is that, in airports and other locations where communications or other electronic equipment is operating, alcohol concentration readings could be distorted. DOT asked manufacturers about this issue, who said that most models of EBTs are shielded to avoid this problem. NHTSA tested three models of EBTs at Washington National Airport and detected no RFI effects on their readings. In addition, NHTSA plans, as part of its process for reviewing quality assurance plans (see discussion below), to have manufacturers establish operational guidelines to avoid RFI problems. The Department believes that it is not necessary to modify the regulatory text to address the commenters' concerns.

Commenters also expressed concern that some EBTs might not be able to distinguish acetone from some alcohols. Commenters also questioned the suitability of the CPL for instruments measuring alcohol concentrations at the 0.02/0.04 levels, since the CPL, at the time of the NPRM, did not address testing at these levels. As noted above, NHTSA has revised the model specifications on which CPL listing of devices is based. The revised specifications address both issues, and EBTs on the CPL will distinguish acetone from alcohol and be accurate at the 0.02/0.04 levels.

A few comments raised other technical issues about the use of EBTs. One issue was the effect of altitude on external calibration standards. Altitude affects gas aerosol standards; NHTSA will address this problem by requiring gas aerosol standards on its CPL for calibration devices to be criterion-referenced for various altitudes.

Another concern was based on the belief that EBTs that display results to only two, rather than three, decimal places would round up. That is, commenters were concerned that someone whose actual alcohol concentration was .036 would be reported as a 0.04, subjecting the individual to heavier sanctions. EBTs on the CPL provide three-digit displays, so this problem does not arise for these devices.

Finally, some commenters expressed concern that defining alcohol concentration in terms of grams of

alcohol per 210 liters of breath was not as accurate as desirable (or as accurate as a blood alcohol reading), because this ratio could vary among individuals. The Department's information is that any variation is very minor and unlikely to affect the results of a breath test or its consequences under these rules. In addition, EBTs are typically calibrated to account for any variation by slightly undercounting alcohol concentration.

Quality Assurance Plans

The NPRM proposed that EBT manufacturers would develop a quality assurance plan (QAP) for each EBT model. The plan would cover such matters as external calibration methods, tolerances and intervals and inspection and maintenance requirements. The manufacturer would have to obtain NHTSA approval of the QAP, and employers would have to comply with it. This compliance includes making external calibration checks as called for in the QAP and taking EBTs out of service if they "flunk" an external calibration check. In addition, the employer would have to ensure that inspection, calibration and maintenance of EBTs is done by the manufacturer, a representative certified by the manufacturer, or an appropriate state agency.

On the basic concept of the QAP, five commenters supported the NPRM's approach, while another eight said that NHTSA, rather than the manufacturer, should establish the standards. Some of the latter commenters appeared concerned that manufacturers may have incentives to establish requirements for their devices that were not optimal. The Department believes that NHTSA approval of the QAPs should be sufficient to ensure that the manufacturer's standards are adequate and that the manufacturers are better positioned than we are to establish model-specific requirements for individual EBTs. For this reason, we are retaining the proposed approach. QAPs would be required for all EBTs on the NHTSA CPL that would be used in DOT-required alcohol testing, whether or not a particular EBT met the additional requirements of this part for use in confirmation testing.

Commenters suggested a wide variety of requirements concerning how frequently an external calibration test must be performed. Some of the ideas included performing such checks before and/or after every test, after every positive test, before, during and after the testing shift, every day, after every five tests, every thirty days, or before disciplinary action is taken on the basis of a positive test. All these comments

respond to a basic point: if an EBT "flunks" an external calibration check, positive tests conducted on that device since the last previous successful external calibration check must be regarded as invalid. This fact provides a strong incentive to employers and BATs to conduct these checks frequently enough to avoid retroactive invalidations of positive tests. In conjunction with the manufacturer's instructions on the QAP, this incentive should be sufficient to induce employers acting in good faith and testers to conduct these checks at appropriate intervals. A generally applicable regulatory requirement for external checks of calibration at a stated interval, on the other hand, would provide less flexibility and might not fit a variety of situations well.

A few commenters suggested specific types of calibration solutions or obtaining such solutions from certified laboratories. Others suggested that the Department establish particular standards for external calibration devices, or allow use of only those external calibration devices that are on the NHTSA CPL. Others suggested particular tolerance standards (e.g., $\pm .005$). The Department does agree that the employers should use external calibration devices that are on the NHTSA CPL, and this requirement has been incorporated into the final rule. The Department does not certify laboratories for production of external calibration solutions, so we could not reasonably require employers to obtain solutions from certified laboratories. For the types of solution that work best with a particular machine, or for the tolerance standard that is most relevant, we believe that reliance on the QAP, based on the manufacturer's knowledge of the behavior of its product, makes the most sense.

On the subject of maintenance, most commenters supported the NPRM's proposal for maintenance by manufacturers, or their representatives, and careful documentation of this activity. These provisions have been retained.

Testing Location

The NPRM called for a testing site that afforded visual and aural privacy to the employee, though in unusual circumstances a test could be conducted elsewhere. The site would have to be secured. A mobile facility (e.g., a van) that met the requirements could be used. At the site, the BAT was to supervise only one employee's use of an EBT at a time, and the BAT could not leave the site when testing was in progress. The Department, with some

modifications, is adopting this provision in the final rule. In our view, privacy in the context of breath alcohol testing is primarily for the purpose limiting other persons' access to information about the employee's test result. In contrast to urine drug testing, where private elimination functions are involved, privacy need not be as strict for breath alcohol testing. We have also eliminated references to the site being "secured," as such, because this term could lead to confusion. Our concern is that unauthorized persons not be in a position to see or overhear test results. We are not requiring that testing take place behind locked doors, in a totally enclosed space, or in a dedicated facility that is not used for other purposes.

There were few comments on this provision. Two commenters noted that privacy could be hard to achieve at a remote site. The NPRM already made allowance for this problem, however, by saying that a testing location did not have to provide full privacy in unusual circumstances such as a post-accident or reasonable suspicion test in a remote location. Other comments included a concern that privacy be protected adequately, that too much privacy could sharpen the concern about confrontations between BATs and employees, and that privacy requirements should not exclude a witness (e.g., a union representative) from the testing site. The provision establishes a general performance standard for privacy of the physical site: It does not address the issue of whether a witness may be present (that is a matter for labor-management negotiation). It does not require a site that is so isolated that a BAT could not find assistance if needed. One commenter asked for a DOT-operated national inspection program for test sites, analogous to the DHHS laboratory certification program. The Department believes that such a system would not be practicable, given the very high number of testing sites likely to be involved with the program.

Testing Form and Log Book

The NPRM proposed to require the use of a standard form for DOT-mandated testing, which employers could not modify. It would be a triplicate form, with copies for the BAT, employer, and employee. The colors of each copy of the form are intended to be consistent with the colors of the Department's drug testing form. The Department has decided to adopt this provision with minor modifications.

Seven commenters supported the NPRM provision as drafted. Thirteen commenters favored having space on

the form for recording a repeat of a test, in order to reduce paperwork. The Department believes that adding space for this purpose would result in a longer, more complicated form. Moreover, it is likely to be only in a minority of cases that a test will have to be repeated, meaning that the extra complexity of the form would not serve a useful purpose in most cases. For this reason, the Department is not adopting this comment.

Two commenters suggested that a combined drug/alcohol form be developed. The Department responds that, because of the differences between drug and alcohol testing, it would be difficult to develop a combined form that would not be too cumbersome and would work in both situations.

Two commenters asked that employers be able to modify the form. The Department's experience with the drug testing program, where some modification of the form has been permitted, is that the resulting variety of forms leads to confusion, errors, and difficulty in completing the form by collection site personnel. The Department believes that an unvarying, standard form will minimize these problems. Employers would have to use the form exactly as presented in Appendix A to this regulation (though a form directly generated by an EBT could be smaller and would not need a space to affix a separate printed result.) One commenter suggested that DOT provide the forms to employers free of charge. The Department does not believe that this is an appropriate use of Federal funds.

Two commenters asked that the form specify that the test is being conducted under the authority of DOT regulations. The Department's experience under the drug testing program is that, for lack of such a statement, some employees have been confused about whether a particular test was being conducted under DOT authority or simply under the employer's policy. The form being published with this rule includes such a statement. The result of including such a statement is that employers are not permitted to use the "DOT form" for a test not conducted under DOT authority.

Two commenters questioned the option to have the EBT or printer print results directly on the form, preferring to use a separate form. The regulation's requirements for EBTs used in confirmation testing provides this option, which is appropriate to provide flexibility. An employer who is uncomfortable with one approach can use the other.

This section of the rule includes a new provision requiring the use of a log book with EBTs, used for screening tests, that do not have the sequential numbering and printing capabilities required for devices used for confirmation tests. This section spells out the requirement for the log book and what it must contain; the rationale for the log book requirement is discussed below.

Preparation for Testing

The NPRM proposed that the BAT and the employee provide identification to one another and that the BAT explain the testing procedure to the employee. A commenter suggested that written information be provided to the employee, so that the briefing could be more detailed and the BAT had less verbal work to perform. The employer may provide the information in this fashion, though the regulation will not require it. Other comments were few and supportive. The NPRM provisions have been retained. Some provisions of this NPRM section, concerning filling out of forms and refused or incomplete tests, have been moved to the next section.

Initial Breath Test Procedures

The NPRM proposed to require an air blank before and after the screening test, which the machine had to pass in order to stay in service. The NPRM also included proposed requirements concerning completing the test paperwork.

Fifteen commenters addressed the issue of air blanks. Seven commenters agreed with the NPRM that air blanks should be required before and after each screening test. Two said that air blanks are not technically relevant with some types of EBTs. Six commenters said that an air blank should not be required after a test when the result was less than 0.02, as this was a waste of time. Some of these commenters favored pre-test air blanks, however. One commenter supported only pre-test air blanks.

The Department has decided that it will not require air blanks either before or after a screening test. First, most screening test results will be below 0.02, making post-test air blanks of limited value in those cases. Second, pre-test air blanks, at the screening stage, are not crucial in preventing "false positives" for employees, since no action against an employee may be taken without a confirmation test. Third, the Department will require air blanks before confirmation tests, which will build this protection into the testing process where it matters most. Fourth, the Department is permitting all EBTs on

the NHTSA CPL to be used in screening tests, and some of these instruments would not provide any durable record of an air blank, even if they were able to perform air blanks. Finally, the absence of a requirement for air blanks on the more frequent screening tests will result in some cumulative savings of BAT and employee time and wear on the machines.

The NPRM called for a 15-20 minute waiting period before the confirmation test; no such waiting period was proposed for before the screening test. Seven commenters favored a waiting period before the screening test, eight opposed it, and two favored employer discretion. Because the confirmation testing procedures do provide for a waiting period, and since action against an employee can be taken only on the basis of a confirmation test, we believe that requiring an additional waiting period before the screening test would be superfluous.

The NPRM provision addressed situations in which the printed and displayed results did not match, proposing that such tests would be invalid. The final rule modifies this provision, since it is irrelevant concerning instruments that do not print out a result. The NPRM provision remains in effect for EBTs that do print out.

The additional flexibility the Department has provided in screening testing procedures, by permitting the use of EBTs that do not have sequential numbering and result printing capabilities, makes it more difficult to determine that a test of a particular employee, with a particular result, has taken place, raising the possibility of cheating by employers. To mitigate this potential problem, the final rule will require a log book to be kept with each EBT used for screening that does not have the sequential numbering and printout capabilities. (This requirement does not apply to EBTs meeting the requirements for devices used for confirmation testing.) The BAT will fill out a log book entry for each test in addition to completing the alcohol testing form. The log book entries are intended to serve as a cross-check on the performance and result of a test.

There were several comments both to this section and the next section concerning whether the cutoff level for a test to which consequences for the employee would attach should be 0.02, 0.04, or, as the NPRM proposed, a bifurcated 0.02/0.04 standard, with different consequences at each level. The rule takes the latter approach, for reasons discussed in the common preamble to the OA rules.

The employee is told to sign the form after the test has been taken. If the employee does not do so, it is not regarded as a refusal to take the test. Obviously, it would be silly to regard as a refusal to take the test a refusal to sign the form after the test had already been successfully conducted. In this situation, the BAT is required to note the failure to sign in the remarks section of the form.

Confirmation Breath Test Procedures

The NPRM instructed the BAT to tell the employee to avoid eating, drinking, etc. during a 15–20 minute interval between the screening and confirmation test, though the test would continue even if the employee did not follow the directions. The BAT would also give the employee a notice not to drive or perform other safety-sensitive functions if the employee's alcohol concentration were 0.04 or greater. After performing the same steps as with the screening test, the BAT would note the alcohol concentration reading and transmit the results to the employer in a confidential manner. The lower of the two readings—screening and confirmation—would control the result.

There were 29 comments concerning the waiting period before the confirmation test, fifteen of which supported the 15-minute minimum time proposed in the NPRM. Four comments wanted a shorter interval (e.g., two or five minutes) and four supported a longer interval (e.g., 20 or 30 minutes). Two comments opposed any requirement concerning an interval. Six comments either wanted no maximum waiting time or preferred to rely on the employer's or EBT manufacturer's discretion.

The waiting period is important. It is intended to give the employee the opportunity to ensure that any residual mouth alcohol does not influence the result of the confirmation test. According to the Department's information, fifteen minutes is the minimum period after which one can be confident that any residual mouth alcohol has disappeared. A shorter interval is not feasible for this reason. At the same time, waiting a long period between tests can be costly in terms of lost employee time and could influence the outcome of the confirmation test. In order to guard against lengthy delays in the performance of confirmation tests, which can allow alcohol concentration levels to fall, the final rule retains the 20-minute maximum. It should be pointed out that failing to observe the minimum 15-minute period is a "fatal flaw" (see § 40.79 (a)), automatically invalidating a test. This is because the

Department believes it is important to prevent artificially high readings due to mouth alcohol residue. However, taking longer than 20 minutes between tests is not a "fatal flaw." The Department is aware that circumstances may sometimes result in stretching the time between tests for a few additional minutes.

Another issue addressed by commenters in a variety of ways was that of whether the screening or confirmation test result prevails when one is higher than the other. Eighteen commenters believed that the confirmation test should prevail in all cases. Two commenters supported using the higher of the two results, while three supported using the lower of the two results. The Department believes that it is more understandable, and less potentially confusing, for the confirmation test result to determine the outcome of the test. The confirmation test will always have to be performed using the most reliable methods. Also, alcohol concentration can still be rising at the time of the screening test. Although it is also possible for alcohol concentration to have dropped since the screening test, the Department's requirement for the confirmation test to be conducted a short time after the screening test should minimize any problem. Finally, this approach is consistent with that the Department takes in drug testing. Consequently, in situations in which a confirmation test is needed, the final rule will attach consequences only to the confirmation test result.

Nine commenters asked that the final rule, unlike the NPRM, provide for medical review officer (MRO) review of the confirmation test result, as the Department requires in drug testing. Among their reasons were that there could be valid medical or food-related reasons for alcohol concentrations, that there could be inadvertent alcohol consumption, that someone should review results for procedural errors, that an MRO should play the role assigned to the substance abuse professional (SAP) by the proposed rules, or that the alcohol rules should mirror the drug rules as much as possible.

In the drug testing context, an MRO determines whether there is a legitimate medical explanation for an individual having in his or her system a substance which is otherwise illegal. The alcohol rules are different in this respect. They prohibit safety sensitive employees from having alcohol concentrations above certain levels, regardless of the source of the alcohol. An alcohol concentration of 0.04 resulting from drinking beverage alcohol has the same consequences

under the rules as an alcohol concentration of 0.04 resulting from ingesting medication. Both uses of alcohol are legal (as long as they do not violate OIA rules concerning on-duty use, pre-duty abstinence, etc.); the resulting alcohol concentration is prohibited by DOT regulations equally in both cases. In this context, there is nothing for an MRO to decide. Inserting an MRO into the process without this key function would add to the complexity and cost of the system without providing any benefits. For these reasons, the Department will not require MRO review of alcohol testing results.

The NPRM proposed that employers could use the same EBT for both the screening and confirmation tests. Fifteen commenters objected to this proposal. Some said that an entirely different methodology should be used for the two tests. The legal issues section of the preamble discusses this point. Others said that a different EBT should be used for each test, some making the argument that using the same machine for both tests constituted "repetition," but not "confirmation." This semantic argument is not persuasive. The statute does not require different machines to be used, as long as the machine used for the second test meets statutory requirements. (Of course, where an employer chooses to use a preliminary EBT for the screening device, it will necessarily use two different machines.) Because of the reliability of EBTs meeting the requirements of this rule, we believe it would be unnecessarily expensive to require a second device to be used, which could have the effect of roughly doubling the capital equipment costs of the program.

Twelve of thirteen commenters opposed requiring a second confirmation test after the first confirmation test had been positive, a matter about which the NPRM preamble asked a question. The Department does not see a basis for requiring a second confirmation test, and we are not adding this requirement to the final rule.

A few commenters suggested getting rid of the requirement for the BAT to notify someone testing positive that he or she should not drive. The Department has decided to include a notice to this effect on the alcohol testing form, making direct participation by the BAT unnecessary.

Two commenters suggested that the rule be clarified to indicate that an employer could have more than one representative to whom results are transmitted. The Department has done so.

Two comments supported, and two opposed, the practice of back extrapolation to obtain a result. The Department's NPRMs proposed that the consequences of test results attach only to employees whose EBT readings were in fact at the stated levels. The Department did not propose to attach these consequences to inferences from EBT readings about what an employee's alcohol concentration might have been at an earlier point. For example, if an employee's EBT test result were .03, the requirement that the individual not again perform safety-sensitive functions until he or she was evaluated by a substance abuse professional (SAP) and had passed a return-to-duty test, and the requirement that the individual be subject to follow-up testing, would not apply because the employer, SAP, or other party believed that the individual's alcohol concentration had been 0.04 or greater prior to the test. Given the wide individual variations in alcohol metabolism among individuals, such inferences involve considerable uncertainty. The Department is retaining the NPRM provision on this point. This would not prevent an OA from making use of back extrapolation in certain situations (e.g., FRA makes some use of back extrapolation in its existing toxicological testing program, in a context involving the use of samples of two different body fluids; inquiries into accident causation or proceedings to revoke DOT-issued certificates or licenses held by employees, where expert testimony can be produced with the protection of the due process procedures of a hearing). These situations are different from the use of back extrapolation by employers in interpreting the results of tests conducted under part 40, however.

There will be some cases in which the BAT who conducts the screening test and the BAT who conducts the confirmation test are different people. For example, BAT #1 conducts a screening test, using an EBT not having sequential numbering or printout capabilities, in location A. The confirmation test, using a device that has these features, happens subsequently in location B, and is conducted by BAT #2. In such a case, to minimize the possibility of lost forms or other errors, the final rule provides that BAT #1 would complete the form for the screening test and give the employee his or her copy of the form. BAT #2 would then start a new form. The sections of the rule concerning screening and confirmation testing procedures have been modified to this effect.

Refused and Incomplete Tests

The final rule, in § 40.67, picks up paragraphs from the NPRM that do not fit conveniently in other sections. The first provides that employee refusals to take certain actions (e.g., complete and sign Step 2 of the form, provide breath) constitute a refusal to be tested. Such refusals, under the operating administration rules, have the same consequences as a test result of 0.04 or greater. The NPRM provision on which this paragraph is based was not the subject of comment. The second paragraph provides that if a test cannot be completed, or an event occurs that would invalidate the test, the BAT would, if practicable, run a retest. All seventeen comments on the subject favored this approach, and the Department is including it in the final rule.

Inability to Provide Sufficient Breath

The NPRM proposed that if an employee were unable to provide enough breath for an adequate sample, the BAT would ask the employee to try again. If the same result occurred, then the employee would be referred to a doctor for a medical evaluation. If the doctor determined that the inability to provide breath was due, or probably due, to a medical condition, the failure to provide the sample would be excused. If not, it would be treated as a refusal.

Four comments supported the NPRM provision. Three others thought that this situation was unlikely to arise, since only an employee who was seriously disabled, unconscious, or dead would be unable to provide the modest quantity of breath required to complete a test. We agree that this situation should not occur frequently; but we believe it is sensible to have a procedure in place to handle the occasional occurrence.

Nine commenters suggested that, if the employee cannot provide sufficient breath, the employee should be required to provide a sample of a body fluid (e.g., blood, urine). Two comments urged employer discretion in these cases. Ten commenters said that there should be a medical evaluation in all cases where an employee cannot produce sufficient breath, though these commenters disagreed with each other about whether the employee should be held out of safety-sensitive functions pending the result of the evaluation.

Under the final rule, the employer is required to direct the employee to be medically evaluated in "shy lung" cases. The final rule directs the employer to ensure that this evaluation

occurs as soon as possible. Employers, under their own authority, could choose to "stand down" an employee pending the result of a medical evaluation, but the rule does not require this step.

In addition, the accompanying NPRM proposes that blood testing may be used in post-accident and reasonable suspicion testing when an EBT is not readily available. Since blood testing, and procedures for it, may become part of the rule for these purposes, the Department is responding to these comments by proposing blood testing as an option (regardless of the type of testing involved) when an employee cannot provide a sufficient breath sample. If the NPRM's proposal is made part of a final rule, the employer would have discretion concerning which alternative (blood alcohol testing or a medical evaluation) to select. Persons interested in this issue are asked to comment to the NPRM docket.

Invalid Tests

The original NPRM listed nine "fatal flaws" that would invalidate breath tests. An invalid test is neither positive nor negative, and it has no consequences for an employee. The NPRM being published today proposes a similar list of fatal flaws for blood tests.

The NPRM proposed that failure to observe the 15-minute minimum waiting period before the confirmation test would be a fatal flaw; going over the 20-minute maximum would not. Comments generally agreed with this approach, some noting that if exceeding a maximum waiting time were to be a fatal flaw, the outer limit should be 30 or 60 minutes rather than 20. One commenter opposed making observance of the minimum a fatal flaw. The Department is retaining the NPRM provision on this point.

The Department is changing the provision concerning air blanks to reflect the final rule's requirement of an air blank before only the confirmation test. Likewise, the NPRM provision making the device's failure to print out a result a fatal flaw has been changed to apply only to confirmation tests. The provision on disagreement between the printout and the machine display concerning sequential test numbers or alcohol concentration has been modified for the same reason. If the employee fails to sign Step 4 of the form, that is not a fatal flaw; the BAT's failure to note the employee's failure to sign that portion of the form would be a fatal flaw, however.

The NPRM proposed that if an EBT fails an external calibration check, every test performed on the device since the

last valid external calibration test would be invalidated. Ten commenters opposed this provision, pointing out that it would cause numerous problems for employers if they had to invalidate tests after the fact, and perhaps had to reverse personnel actions as well. Four commenters supported the proposed requirement. The Department is well aware that after-the-fact invalidations of tests can create serious problems for employers. The Department does not see a workable alternative, however. If a valid external calibration check was performed after test A, and an invalid external calibration test was performed after test K, all we know for certain is that the machine went out of kilter somewhere between tests B and K. We cannot say for certain that test B or C was valid, or assume that the error occurred only on test K. Since we cannot determine that these tests were valid, we must, in fairness to the employees involved, treat them as invalid. Tests with results of 0.02 and above would be deemed invalid in this situation. This is surely incentive for employers to conduct frequent external calibration checks, particularly after positive tests.

One commenter suggested additional fatal flaws, such as failure to use a clean mouthpiece, inadequate grounds for reasonable suspicion, etc. One commenter suggested that all flaws should be regarded as fatal. The Department believes that only certain serious problems in the process, that directly affect the integrity of the test or accuracy of the result, should automatically invalidate the test. Other errors, particularly in combination with one another, could form the basis for a determination that a test is invalid (i.e., the listed fatal flaws are not intended to be the only possible grounds for invalidation). The Office of Drug Enforcement and Program Compliance is charged with providing, on behalf of the Department, definitive guidance on issues concerning the invalidation of tests.

Availability of Testing Information

The NPRM proposed provisions on alcohol test information availability parallel to the existing provisions on the availability of drug testing information, as the Department has interpreted them. Employers could release information to a third party only with the specific written consent of the employee, must keep confidential information secure, but may make the information available in certain litigation situations. Employers must make information available to DOT or, under some circumstances, to the National

Transportation Safety Board (NTSB). Employers must also make information about an employee's test available to that employee.

Seven commenters, most of whom were from the motor carrier industry, asked that employers be authorized or required to make testing information available to third parties without the employee's consent. In this industry, the commenters said, there was a high turnover rate. Employees move rapidly from employer to employer. In the absence of authorization or requirement for a former employer to provide testing information to a potential new employer, either the hiring process would be slowed or important information about positive tests in the employee's past would be unavailable to the new employer.

In response, the Department points out that an employer may, without authorization from DOT, require an applicant, as a condition of employment, to give written consent to the disclosure of this information by a former employer. The Department is adding a sentence to this provision of the rule telling employers that they must provide the information when the employee consents to its transmission to a third party. However, in order to maintain the confidentiality of sensitive information, in which employees have a significant privacy interest, the Department will not authorize the transmission of this information among employers or potential employers without written employee consent.

The Department emphasizes that the consent involved must be a specific written consent for information to be sent from one named party to another named party. Blanket consents (i.e., a consent for testing information to be sent to all present or future employers or members of a consortium) are not permitted. Each consent must pertain to one specific employer providing the information about a particular employee to another specific employer.

Two commenters suggested that an employee should not have to pay for obtaining information in his or her own file concerning alcohol tests. The Department believes that this is a matter better left to employer-employee agreements. As the Department interprets this provision, employers may impose reasonable charges to cover the cost of retrieval, copying, and transmission of the records requested. The employer is also expected only to provide copies within its possession or control (including documents that may be maintained by a consortium or third-party provider that conducted testing for the employer).

Records Concerning BATs and EBTs

The NPRM proposed that the employer maintain various records concerning EBTs and BATs for five years. One commenter suggested that consortia and third-party providers be authorized to keep the records instead of the employer. The Department agrees that this is reasonable, and the final rule requires the employer or its agent to maintain the records. The employer retains ultimate responsibility for producing the records, however. Two commenters suggested we reduce the record retention period to two years, while one commenter said that the recordkeeping requirements in the NPRM were not burdensome. Consistent with the OA rules, the final part 40 rule establishes a 5-year retention period for calibration records and a two-year retention period for other records.

Other Issues

A number of commenters asked that we modify the definition of alcohol to include alcohols other than ethanol (e.g., methanol, isopropanol), in order to avoid loopholes in the program that would allow an employee to claim that his or her alcohol concentration reading was the result of ingesting a non-ethanol substance. The Department agrees that the definition should be broadened to avoid any potential problems with the use of non-ethanol alcohols, and the final rule includes a modified definition to this effect. This revised definition is consistent with that used by NHTSA in its model specifications for evidential EBTs. We have also added a companion definition of alcohol use, which emphasizes that any consumption of a preparation including alcohol (e.g., beverages, medicines) counts as alcohol use.

A few commenters asked that, for convenience, we centralize all the definitions in part 40 in one section. We have done so, and all the definitions are now in § 40.3.

The NPRM preamble asked for suggestions on how to deal with situations in which an arbitrator overturns an employer's personnel action based on an alcohol test result. Employers had expressed concern about perceived conflicts between the arbitrator's decisions and DOT regulations, and several commenters echoed these concerns. The Department is not convinced, however, that this problem is either frequent enough or serious enough to warrant a mandate in the regulatory text. Such a mandate, because it could not anticipate all the nuances of the factual situations involved, might interfere with

reasonable resolutions of particular disputes.

However, it is clear that employers are obligated to comply with DOT safety regulations, which have the force and effect of law. As a matter of law, no decision by an employer, employee organization, or individual or group appointed by those or other parties, can have the effect of excusing noncompliance by an employer with a provision of a DOT safety regulation. If a violation of DOT rules has occurred, then the consequences prescribed by DOT rules must follow (e.g., the employee must be removed from performing a safety-sensitive function).

In the NPRM preamble, the Department included a discussion of handling of perceived conflicts between part 40 and operating administration regulations, exemptions, and the obligations of consortia and third-party providers (57 FR 59410; December 15, 1992). This discussion applies to the implementation of the final part 40 as well. The relevant language is reprinted below:

Although implementation of part 40 generally would be done through an operating administration, part 40 is an Office of the Secretary of Transportation (OST) regulation. As such, requests for exemption would be processed under 49 CFR part 5, an existing regulation covering requests for exemption from or amendment to all OST rules, rather than through separate operating administration exemption procedures. This would add an additional element of consistency. This approach is consistent with the existing part 40 drug testing procedures, from which exemptions would also be granted under part 40. (See 54 FR 49863; December 1, 1989).

The grant of an exemption under part 40 must be based on special or exceptional circumstances. It is not appropriate to carve out a generally applicable exception to a rule. Also, an exemption must be based on circumstances not contemplated as part of the rulemaking. The exemption process is not designed to revisit issues settled in the rulemaking process.

Section 40.1 would also emphasize that other parties involved in the testing process—such as consortia, contractors, and agents—“stand in the shoes” of the employer. They are, therefore, subject to the same obligations and requirements as the employer. If an employer is required to do something, so is the consortium that is conducting testing for the employer. If the consortium fails to do something correctly, the employer is in noncompliance.

Since, as noted above, part 40 is a regulation of the Office of the Secretary of Transportation, the source of definitive interpretations of the rule is the Office of the Secretary. Interpretations have been and will continue to be made in close

coordination among the OAs, the Office of Drug Enforcement and Program Compliance (DEPC), and the Office of General Counsel.

Regulatory Analyses and Notices

Because of substantial public interest and substantial impacts on a wide range of private and public sector organizations, the Department has determined that this rule—in conjunction with the operating administration alcohol and drug testing rules—is significant under Executive Order 12866. The rule has been reviewed under this Order. It is also significant under the Department's regulatory policies and procedures. The Department has prepared a regulatory evaluation for part 40, which we have included in the docket. The costs of the application of part 40 procedures to the programs of the various OAs are estimated in each of the OAs' regulatory evaluations for their drug and alcohol rules being published today.

This rule, in conjunction with the operating administration drug and alcohol testing rules, is likely to have a significant economic impact on a substantial number of small entities. These impacts are assessed in the OAs' regulatory evaluations. The Federalism impacts of this rule are either minimal or required by statute; for these reasons, we have not prepared a Federalism assessment.

This rule also contains collection of information requirements. The Department has submitted these requirements to the Office of Management and Budget for review and approval under the Paperwork Reduction Act (44 U.S.C. 350, *et. seq.*). Please see the Common Preamble on the status of Paperwork Reduction Act approvals.

List of Subjects in 49 CFR Part 40

Drug testing, Reporting and recordkeeping requirements, Safety, Transportation.

Issued This 25th day of January, 1994, at Washington, D.C.

Federico Peña,

Secretary of Transportation.

David R. Hinson,

Administrator, Federal Aviation Administration.

Rodney E. Slater,

Administrator, Federal Highway Administration.

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Administrator, Federal Railroad Administration.

Gordon J. Linton,

Administrator, Federal Transit Administration.

Ana Sol Gutiérrez,

Acting Administrator, Research and Special Programs Administration.

Adm. J. William Kime,

Commandant, United States Coast Guard.

For the reasons set forth in the preamble, the Department of Transportation amends Title 49, Code of Federal Regulations, part 40, as follows:

PART 40—PROCEDURES FOR TRANSPORTATION WORKPLACE DRUG AND ALCOHOL TESTING PROGRAMS

1. The authority citation for Part 40 is revised to read as follows:

Authority: 49 U.S.C. 102,301,322; 49 U.S.C. app. 1301nt., app. 1434nt., app. 2717, app. 1618a.

2. §§ 40.1 through 40.19 are designated as subpart A and revised to read as follows:

Subpart A—General

40.1 Applicability.

40.3 Definitions.

40.5–40.19 [Reserved]

Subpart A—GENERAL

§ 40.1 Applicability.

This part applies, through regulations that reference it issued by agencies of the Department of Transportation, to transportation employers, including self-employed individuals, required to conduct drug and/or alcohol testing programs by DOT agency regulations and to such transportation employers' officers, employees, agents and contractors (including, but not limited to, consortia). Employers are responsible for the compliance of their officers, employees, agents, consortia and/or contractors with the requirements of this part.

§ 40.3 Definitions.

The following definitions apply to this part:

Air blank. A reading by an EBT of ambient air containing no alcohol. (In

EBTs using gas chromatography technology, a reading of the device's internal standard.)

Alcohol. The intoxicating agent in beverage alcohol, ethyl alcohol or other low molecular weight alcohols including methyl or isopropyl alcohol.

Alcohol concentration. The alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by a breath test under this part.

Alcohol use. The consumption of any beverage, mixture or preparation, including any medication, containing alcohol.

Aliquot. A portion of a specimen used for testing.

Blind sample or blind performance test specimen. A urine specimen submitted to a laboratory for quality control testing purposes, with a fictitious identifier, so that the laboratory cannot distinguish it from employee specimens, and which is spiked with known quantities of specific drugs or which is blank, containing no drugs.

Breath Alcohol Technician (BAT). An individual who instructs and assists individuals in the alcohol testing process and operates an EBT.

Canceled or invalid test. In drug testing, a drug test that has been declared invalid by a Medical Review Officer. A canceled test is neither a positive nor a negative test. For purposes of this part, a sample that has been rejected for testing by a laboratory is treated the same as a canceled test. In alcohol testing, a test that is deemed to be invalid under § 40.79. It is neither a positive nor a negative test.

Chain of custody. Procedures to account for the integrity of each urine or blood specimen by tracking its handling and storage from point of specimen collection to final disposition of the specimen. With respect to drug testing, these procedures shall require that an appropriate drug testing custody form (see § 40.23(a)) be used from time of collection to receipt by the laboratory and that upon receipt by the laboratory an appropriate laboratory chain of custody form(s) account(s) for the sample or sample aliquots within the laboratory.

Collection container. A container into which the employee urinates to provide the urine sample used for a drug test.

Collection site. A place designated by the employer where individuals present themselves for the purpose of providing a specimen of their urine to be analyzed for the presence of drugs.

Collection site person. A person who instructs and assists individuals at a collection site and who receives and

makes a screening examination of the urine specimen provided by those individuals.

Confirmation (or confirmatory) test. In drug testing, a second analytical procedure to identify the presence of a specific drug or metabolite that is independent of the screening test and that uses a different technique and chemical principle from that of the screening test in order to ensure reliability and accuracy. (Gas chromatography/mass spectrometry (GC/MS) is the only authorized confirmation method for cocaine, marijuana, opiates, amphetamines, and phencyclidine.) In alcohol testing, a second test, following a screening test with a result of 0.02 or greater, that provides quantitative data of alcohol concentration.

DHHS. The Department of Health and Human Services or any designee of the Secretary, Department of Health and Human Services.

DOT agency. An agency of the United States Department of Transportation administering regulations related to drug or alcohol testing, including the United States Coast Guard (for drug testing purposes only), the Federal Aviation Administration, the Federal Railroad Administration, the Federal Highway Administration, the Federal Transit Administration, the Research and Special Programs Administration, and the Office of the Secretary.

Employee. An individual designated in a DOT agency regulation as subject to drug testing and/or alcohol testing. As used in this part "employee" includes an applicant for employment. "Employee" and "individual" or "individual to be tested" have the same meaning for purposes of this part.

Employer. An entity employing one or more employees that is subject to DOT agency regulations requiring compliance with this part. As used in this part, employer includes an industry consortium or joint enterprise comprised of two or more employing entities.

EBT (or evidential breath testing device). An EBT approved by the National Highway Traffic Safety Administration (NHTSA) for the evidential testing of breath and placed on NHTSA's "Conforming Products List of Evidential Breath Measurement Devices" (CPL).

Medical Review Officer (MRO). A licensed physician (medical doctor or doctor of osteopathy) responsible for receiving laboratory results generated by an employer's drug testing program who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an

individual's confirmed positive test result together with his or her medical history and any other relevant biomedical information.

Screening test (or initial test). In drug testing, an immunoassay screen to eliminate "negative" urine specimens from further analysis. In alcohol testing, an analytic procedure to determine whether an employee may have a prohibited concentration of alcohol in a breath specimen.

Secretary. The Secretary of Transportation or the Secretary's designee.

Shipping container. A container capable of being secured with a tamper-evident seal that is used for transfer of one or more urine specimen bottle(s) and associated documentation from the collection site to the laboratory.

Specimen bottle. The bottle that, after being labeled and sealed according to the procedures in this part, is used to transmit a urine sample to the laboratory.

§§ 40.5–40.19 [Reserved]

2. §§ 40.21 through 40.39 are designated subpart B.

Subpart B—Drug Testing

- 40.21 The drugs.
 - 40.23 Preparation for testing.
 - 40.25 Specimen collection procedures.
 - 40.27 Laboratory personnel.
 - 40.29 Laboratory analysis procedures.
 - 40.31 Quality assurance and quality control.
 - 40.33 Reporting and review of results.
 - 40.35 Protection of employee records.
 - 40.37 Individual access to test and laboratory certification results.
 - 40.39 Use of DHHS—certified laboratories.
- Authority: 49 U.S.C. 102, 301, 322; 49 U.S.C. app. 1301nt., app. 1434nt., app. 2717, app. 1618a.

3. In § 40.25, paragraph (f)(10) is revised to read as follows:

§ 40.25 Specimen collection procedures.

* * * * *

(f) * * *

(10) The collection site person shall instruct the employee to provide at least 45 ml of urine under the split sample method of collection or 30 ml of urine under the single sample method of collection.

(i)(A) Employers with employees subject to drug testing only under the drug testing rules of the Research and Special Programs Administration and/or Coast Guard may use the "split sample" method of collection or may collect a single sample for those employees.

(B) Employers with employees subject to drug testing under the drug testing rules of the Federal Highway Administration, Federal Railroad

Administration, Federal Transit Administration, or Federal Aviation Administration shall use the "split sample" method of collection for those employees.

(ii) Employers using the split sample method of collection shall follow the procedures in this paragraph (f)(10)(ii):

(A) The donor shall urinate into a collection container or a specimen bottle capable of holding at least 60 ml.

(B) If a collection container is used, the collection site person, in the presence of the donor, pours the urine into two specimen bottles. Thirty (30) ml shall be poured into one bottle, to be used as the primary specimen. At least 15 ml shall be poured into the other bottle, to be used as the split specimen.

(C) If a single specimen bottle is used as a collection container, the collection site person shall pour 30 ml of urine from the specimen bottle into a second specimen bottle (to be used as the primary specimen) and retain the remainder (at least 15 ml) in the collection bottle (to be used as the split specimen).

(D) Both bottles shall be shipped in a single shipping container, together with copies 1, 2, and the split specimen copy of the chain of custody form, to the laboratory.

(E) If the test result of the primary specimen is positive, the employee may request that the MRO direct that the split specimen be tested in a different DHHS-certified laboratory for presence of the drug(s) for which a positive result was obtained in the test of the primary specimen. The MRO shall honor such a request if it is made within 72 hours of the employee having been notified of a verified positive test result.

(F) When the MRO informs the laboratory in writing that the employee has requested a test of the split specimen, the laboratory shall forward, to a different DHHS-approved laboratory, the split specimen bottle, with seal intact, a copy of the MRO request, and the split specimen copy of the chain of custody form with appropriate chain of custody entries.

(G) The result of the test of the split specimen is transmitted by the second laboratory to the MRO.

(H) Action required by DOT agency regulations as the result of a positive drug test (e.g., removal from performing a safety-sensitive function) is not stayed pending the result of the test of the split specimen.

(I) If the result of the test of the split specimen fails to reconfirm the presence of the drug(s) or drug metabolite(s) found in the primary specimen, the MRO shall cancel the test, and report the cancellation and the reasons for it to

the DOT, the employer, and the employee.

(iii) Employers using the single sample collection method shall follow the procedures in paragraph:

(A) The collector may choose to direct the employee to urinate either directly into a specimen bottle or into a separate collection container.

(B) If a separate collection container is used, the collection site person shall pour at least 30 ml of the urine from the collection container into the specimen bottle in the presence of the employee.

(iv) In either collection methodology, upon receiving the specimen from the individual, the collection site person shall determine if it has at least 30 milliliters of urine for the primary or single specimen bottle and, where the split specimen collection method is used, an additional 15 ml of urine for the split specimen bottle. If the individual is unable to provide such a quantity of urine, the collection site person shall instruct the individual to drink not more than 24 ounces of fluids and, after a period of up to two hours, again attempt to provide a complete sample using a fresh collection container. The original insufficient specimen shall be discarded. If the employee is still unable to provide an adequate specimen, the insufficient specimen shall be discarded, testing discontinued, and the employer so notified. The MRO shall refer the individual for a medical evaluation to develop pertinent information concerning whether the individual's inability to provide a specimen is genuine or constitutes a refusal to test. (In preemployment testing, if the employer does not wish to hire the individual, the MRO is not required to make such a referral.) Upon completion of the examination, the MRO shall report his or her conclusions to the employer in writing.

4. In § 40.29, paragraph (b)(2) is revised and paragraph (b)(3) is added, as follows:

§ 40.29 Laboratory analysis procedures.

(b) * * * *

(2) In situations where the employer uses the split sample collection method, the laboratory shall log in the split specimen, with the split specimen bottle seal remaining intact. The laboratory shall store this sample securely (see paragraph (c) of this section). If the result of the test of the primary specimen is negative, the laboratory may discard the split specimen. If the result of the test of the primary specimen is positive, the laboratory

shall retain the split specimen in frozen storage for 60 days from the date on which the laboratory acquires it (see paragraph (h) of this section). Following the end of the 60-day period, if not informed by the MRO that the employee has requested a test of the split specimen, the laboratory may discard the split specimen.

(3) When directed, in writing by the MRO to forward the split specimen to another DHHS-certified laboratory for analysis, the second laboratory shall analyze the split specimen by GC/MS to reconfirm the presence of the drug(s) or drug metabolite(s) found in the primary specimen. Such GC/MS confirmation shall be conducted without regard to the cutoff levels of § 40.29(f). The split specimen shall be retained in long-term storage for one year by the laboratory conducting the analysis of the split specimen (or longer if litigation concerning the test is pending).

6. In § 40.33 paragraphs (e), (f) and (g) are revised; paragraph (h) is redesignated as paragraph (i), and a new paragraph (h) is added, as follows:

§ 40.33 Reporting and review of results.

(e) In a situation in which the employer has used the single sample method of collection, the MRO shall notify each employee who has a confirmed positive test that the employee has 72 hours in which to request a reanalysis of the original specimen, if the test is verified positive. If requested to do so by the employee within 72 hours of the employee's having been informed of a verified positive test, the Medical Review Officer shall direct, in writing, a reanalysis of the original sample. The MRO may also direct, in writing, such a reanalysis if the MRO questions the accuracy or validity of any test result. Only the MRO may authorize such a reanalysis, and such a reanalysis may take place only at laboratories certified by DHHS. If the reanalysis fails to reconfirm the presence of the drug or drug metabolite, the MRO shall cancel the test and report the cancellation and the reasons for it to the DOT, the employer and the employee.

(f) In situations in which the employer uses the split sample method of collection, the MRO shall notify each employee who has a confirmed positive test that the employee has 72 hours in which to request a test of the split specimen, if the test is verified as positive. If the employee requests an analysis of the split specimen within 72 hours of having been informed of a verified positive test, the MRO shall

direct, in writing, the laboratory to provide the split specimen to another DHHS-certified laboratory for analysis. If the analysis of the split specimen fails to reconfirm the presence of the drug(s) or drug metabolite(s) found in the primary specimen, or if the split specimen is unavailable, inadequate for testing or untestable, the MRO shall cancel the test and report cancellation and the reasons for it to the DOT, the employer, and the employee.

(g) If an employee has not contacted the MRO within 72 hours, as provided in paragraphs (e) and (f) of this section, the employee may present to the MRO information documenting that serious illness, injury, inability to contact the MRO, lack of actual notice of the verified positive test, or other circumstances unavoidably prevented the employee from timely contacting the MRO. If the MRO concludes that there is a legitimate explanation for the employee's failure to contact the MRO within 72 hours, the MRO shall direct that the reanalysis of the primary specimen or analysis of the split specimen, as applicable, be performed.

(h) When the employer uses the split sample method of collection, the employee is not authorized to request a reanalysis of the primary specimen as provided in paragraph (e) of this section.

* * * * *

7. A new subpart C is added to part 40, to read as follows:

Subpart C—Alcohol Testing

40.51 The breath alcohol technician.

40.53 Devices to be used for breath alcohol tests.

40.55 Quality assurance plans for EBTs.

40.57 Locations for breath alcohol testing.

40.59 The breath alcohol testing form and log book.

40.61 Preparation for breath alcohol testing.

40.63 Procedures for screening tests.

40.65 Procedures for confirmation tests.

40.67 Refusals to test and uncompleted tests.

40.69 Inability to provide an adequate amount of breath.

40.71 [Reserved]

40.73 [Reserved]

40.75 [Reserved]

40.77 [Reserved]

40.79 Invalid Tests.

40.81 Availability and disclosure of alcohol testing information about individual employees.

40.83 Maintenance and disclosure of records concerning EBTs and BATs.

Appendix A—The Breath Alcohol Testing Form

Authority: 49 U.S.C. 102, 301, 322; 49 U.S.C. app. 1301nt., app. 1434nt., app. 2717, app. 1618a.

§ 40.51 The breath alcohol technician.

(a) The breath alcohol technician (BAT) shall be trained to proficiency in the operation of the EBT he or she is using and in the alcohol testing procedures of this part.

(1) Proficiency shall be demonstrated by successful completion of a course of instruction which, at a minimum, provides training in the principles of EBT methodology, operation, and calibration checks; the fundamentals of breath analysis for alcohol content; and the procedures required in this part for obtaining a breath sample, and interpreting and recording EBT results.

(2) Only courses of instruction for operation of EBTs that are equivalent to the Department of Transportation model course, as determined by the National Highway Traffic Safety Administration (NHTSA), may be used to train BATs to proficiency. On request, NHTSA will review a BAT instruction course for equivalency.

(3) The course of instruction shall provide documentation that the BAT has demonstrated competence in the operation of the specific EBT(s) he/she will use.

(4) Any BAT who will perform an external calibration check of an EBT shall be trained to proficiency in conducting the check on the particular model of EBT, to include practical experience and demonstrated competence in preparing the breath alcohol simulator or alcohol standard, and in maintenance and calibration of the EBT.

(5) The BAT shall receive additional training, as needed, to ensure proficiency, concerning new or additional devices or changes in technology that he or she will use.

(6) The employer or its agent shall establish documentation of the training and proficiency test of each BAT it uses to test employees, and maintain the documentation as provided in § 40.83.

(b) A BAT-qualified supervisor of an employee may conduct the alcohol test for that employee only if another BAT is unavailable to perform the test in a timely manner. A supervisor shall not serve as a BAT for the employee in any circumstance prohibited by a DOT operating administration regulation.

(c) Law enforcement officers who have been certified by state or local governments to conduct breath alcohol testing are deemed to be qualified as BATs. In order for a test conducted by such an officer to be accepted under Department of Transportation alcohol testing requirements, the officer must have been certified by a state or local government to use the EBT that was used for the test.

§ 40.53 Devices to be used for breath alcohol tests.

(a) For screening tests, employers shall use only EBTs. When the employer uses for a screening test an EBT that does not meet the requirements of paragraph (b) (1) through (3) of this section, the employer shall use a log book in conjunction with the EBT (see § 40.59(c)).

(b) For confirmation tests, employers shall use EBTs that meet the following requirements:

(1) EBTs shall have the capability of providing, independently or by direct link to a separate printer, a printed result in triplicate (or three consecutive identical copies) of each breath test and of the operations specified in paragraphs (b) (2) and (3) of this section.

(2) EBTs shall be capable of assigning a unique and sequential number to each completed test, with the number capable of being read by the BAT and the employee before each test and being printed out on each copy of the result.

(3) EBTs shall be capable of printing out, on each copy of the result, the manufacturer's name for the device, the device's serial number, and the time of the test.

(4) EBTs shall be able to distinguish alcohol from acetone at the 0.02 alcohol concentration level.

(5) EBTs shall be capable of the following operations:

(i) Testing an air blank prior to each collection of breath; and

(ii) Performing an external calibration check.

§ 40.55 Quality assurance plans for EBTs.

(a) In order to be used in either screening or confirmation alcohol testing subject to this part, an EBT shall have a quality assurance plan (QAP) developed by the manufacturer.

(1) The plan shall designate the method or methods to be used to perform external calibration checks of the device, using only calibration devices on the NHTSA "Conforming Products List of Calibrating Units for Breath Alcohol Tests."

(2) The plan shall specify the minimum intervals for performing external calibration checks of the device. Intervals shall be specified for different frequencies of use, environmental conditions (e.g., temperature, altitude, humidity), and contexts of operation (e.g., stationary or mobile use).

(3) The plan shall specify the tolerances on an external calibration check within which the EBT is regarded to be in proper calibration.

(4) The plan shall specify inspection, maintenance, and calibration

requirements and intervals for the device.

(5) For a plan to be regarded as valid, the manufacturer shall have submitted the plan to NHTSA for review and have received NHTSA approval of the plan.

(b) The employer shall comply with the NHTSA-approved quality assurance plan for each EBT it uses for alcohol screening or confirmation testing subject to this part.

(1) The employer shall ensure that external calibration checks of each EBT are performed as provided in the QAP.

(2) The employer shall take an EBT out of service if any external calibration check results in a reading outside the tolerances for the EBT set forth in the QAP. The EBT shall not again be used for alcohol testing under this part until it has been serviced and has had an external calibration check resulting in a reading within the tolerances for the EBT.

(3) The employer shall ensure that inspection, maintenance, and calibration of each EBT are performed by the manufacturer or a maintenance representative certified by the device's manufacturer or a state health agency or other appropriate state agency. The employer shall also ensure that each BAT or other individual who performs an external calibration check of an EBT used for alcohol testing subject to this part has demonstrated proficiency in conducting such a check of the model of EBT in question.

(4) The employer shall maintain records of the external calibration checks of EBTs as provided in § 40.83.

(c) When the employer is not using the EBT at an alcohol testing site, the employer shall store the EBT in a secure space.

§ 40.57 Locations for breath alcohol testing.

(a) Each employer shall conduct alcohol testing in a location that affords visual and aural privacy to the individual being tested, sufficient to prevent unauthorized persons from seeing or hearing test results. All necessary equipment, personnel, and materials for breath testing shall be provided at the location where testing is conducted.

(b) An employer may use a mobile collection facility (e.g., a van equipped for alcohol testing) that meets the requirements of paragraph (a) of this section.

(c) No unauthorized persons shall be permitted access to the testing location when the EBT remains unsecured or, in order to prevent such persons from seeing or hearing a testing result, at any time when testing is being conducted.

(d) In unusual circumstances (e.g., when it is essential to conduct a test outdoors at the scene of an accident), a test may be conducted at a location that does not fully meet the requirements of paragraph (a) of this section. In such a case, the employer or BAT shall provide visual and aural privacy to the employee to the greatest extent practicable.

(e) The BAT shall supervise only one employee's use of the EBT at a time. The BAT shall not leave the alcohol testing location while the testing procedure for a given employee (see §§ 40.61 through 40.65) is in progress.

§ 40.59 The breath alcohol testing form and log book.

(a) Each employer shall use the breath alcohol testing form prescribed under this part. The form is found in appendix A to this subpart. Employers may not modify or revise this form, except that a form directly generated by an EBT may omit the space for affixing a separate printed result to the form.

(b) The form shall provide triplicate (or three consecutive identical) copies. Copy 1 (white) shall be retained by the BAT. Copy 2 (green) shall be provided to the employee. Copy 3 (blue) shall be transmitted to the employer. Except for a form generated by an EBT, the form shall be 8½ by 11 inches in size.

(c) A log book shall be used in conjunction with any EBT used for screening tests that does not meet the requirements of § 40.53(b) (1) through (3). There shall be a log book for each such device, that is not used in conjunction with any other device and that is used to record every test conducted on the device. The log book shall include columns for the test number, date of the test, name of the BAT, location of the test, quantified test result, and initials of the employee taking each test.

§ 40.61 Preparation for breath alcohol testing.

(a) When the employee enters the alcohol testing location, the BAT will require him or her to provide positive identification (e.g., through use of a photo I.D. card or identification by an employer representative). On request by the employee, the BAT shall provide positive identification to the employee.

(b) The BAT shall explain the testing procedure to the employee.

§ 40.63 Procedures for screening tests.

(a) The BAT shall complete Step 1 on the Breath Alcohol Testing Form. The employee shall then complete Step 2 on the form, signing the certification. Refusal by the employee to sign this

certification shall be regarded as a refusal to take the test.

(b) An individually-sealed mouthpiece shall be opened in view of the employee and BAT and attached to the EBT in accordance with the manufacturer's instructions.

(c) The BAT shall instruct the employee to blow forcefully into the mouthpiece for at least 6 seconds or until the EBT indicates that an adequate amount of breath has been obtained.

(d)(1) If the EBT does not meet the requirements of § 40.53(b)(1) through (3), the BAT and the employee shall take the following steps:

(i) Show the employee the result displayed on the EBT. The BAT shall record the displayed result, test number, testing device, serial number of the testing device, time and quantified result in Step 3 of the form.

(ii) Record the test number, date of the test, name of the BAT, location, and quantified test result in the log book. The employee shall initial the log book entry.

(2) If the EBT provides a printed result, but does not print the results directly onto the form, the BAT shall show the employee the result displayed on the EBT. The BAT shall then affix the test result printout to the breath alcohol test form in the designated space, using a method that will provide clear evidence of removal (e.g., tamper-evident tape).

(3) If the EBT prints the test results directly onto the form, the BAT shall show the employee the result displayed on the EBT.

(e)(1) In any case in which the result of the screening test is a breath alcohol concentration of less than 0.02, the BAT shall date the form and sign the certification in Step 3 of the form. The employee shall sign the certification and fill in the date in Step 4 of the form.

(2) If the employee does not sign the certification in Step 4 of the form or does not initial the log book entry for a test, it shall not be considered a refusal to be tested. In this event, the BAT shall note the employee's failure to sign or initial in the "Remarks" section of the form.

(3) If a test result printed by the EBT (see paragraph (d)(2) or (d)(3) of this section) does not match the displayed result, the BAT shall note the disparity in the remarks section. Both the employee and the BAT shall initial or sign the notation. In accordance with § 40.79, the test is invalid and the employer and employee shall be so advised.

(4) No further testing is authorized. The BAT shall transmit the result of less than 0.02 to the employer in a

confidential manner, and the employer shall receive and store the information so as to ensure that confidentiality is maintained as required by § 40.81.

(f) If the result of the screening test is an alcohol concentration of 0.02 or greater, a confirmation test shall be performed as provided in § 40.65.

(g) If the confirmation test will be conducted by a different BAT, the BAT who conducts the screening test shall complete and sign the form and log book entry. The BAT will provide the employee with Copy 2 of the form.

§ 40.65 Procedures for confirmation tests.

(a) If a BAT other than the one who conducted the screening test is conducting the confirmation test, the new BAT shall follow the procedures of § 40.61.

(b) The BAT shall instruct the employee not to eat, drink, put any object or substance in his or her mouth, and, to the extent possible, not belch during a waiting period before the confirmation test. This time period begins with the completion of the screening test, and shall not be less than 15 minutes. The confirmation test shall be conducted within 20 minutes of the completion of the screening test. The BAT shall explain to the employee the reason for this requirement (*i.e.*, to prevent any accumulation of mouth alcohol leading to an artificially high reading) and the fact that it is for the employee's benefit. The BAT shall also explain that the test will be conducted at the end of the waiting period, even if the employee has disregarded the instruction. If the BAT becomes aware that the employee has not complied with this instruction, the BAT shall so note in the "Remarks" section of the form.

(c) (1) If a BAT other than the one who conducted the screening test is conducting the confirmation test, the new BAT shall initiate a new Breath Alcohol Testing form. The BAT shall complete Step 1 on the form. The employee shall then complete Step 2 on the form, signing the certification. Refusal by the employee to sign this certification shall be regarded as a refusal to take the test. The BAT shall note in the "Remarks" section of the form that a different BAT conducted the screening test.

(2) In all cases, the procedures of § 40.63 (a), (b), and (c) shall be followed. A new mouthpiece shall be used for the confirmation test.

(d) Before the confirmation test is administered for each employee, the BAT shall ensure that the EBT registers 0.00 on an air blank. If the reading is greater than 0.00, the BAT shall conduct

one more air blank. If the reading is greater than 0.00, testing shall not proceed using that instrument. However, testing may proceed on another instrument.

(e) Any EBT taken out of service because of failure to perform an air blank accurately shall not be used for testing until a check of external calibration is conducted and the EBT is found to be within tolerance limits.

(f) In the event that the screening and confirmation test results are not identical, the confirmation test result is deemed to be the final result upon which any action under operating administration rules shall be based.

(g) (1) If the EBT provides a printed result, but does not print the results directly onto the form, the BAT shall show the employee the result displayed on the EBT. The BAT shall then affix the test result printout to the breath alcohol test form in the designated space, using a method that will provide clear evidence of removal (*e.g.*, tamper-evident tape).

(2) If the EBT prints the test results directly onto the form, the BAT shall show the employee the result displayed on the EBT.

(h) (1) Following the completion of the test, the BAT shall date the form and sign the certification in Step 3 of the form. The employee shall sign the certification and fill in the date in Step 4 of the form.

(2) If the employee does not sign the certification in Step 4 of the form or does not initial the log book entry for a test, it shall not be considered a refusal to be tested. In this event, the BAT shall note the employee's failure to sign or initial in the "Remarks" section of the form.

(3) If a test result printed by the EBT (see paragraph (g)(1) or (g)(2) of this section) does not match the displayed result, the BAT shall note the disparity in the remarks section. Both the employee and the BAT shall initial or sign the notation. In accordance with § 40.79, the test is invalid and the employer and employee shall be so advised.

(4) The BAT shall conduct an air blank. If the reading is greater than 0.00, the test is invalid.

(i) The BAT shall transmit all results to the employer in a confidential manner.

(1) Each employer shall designate one or more employer representatives for the purpose of receiving and handling alcohol testing results in a confidential manner. All communications by BATs to the employer concerning the alcohol testing results of employees shall be to a designated employer representative.

(2) Such transmission may be in writing, in person or by telephone or electronic means, but the BAT shall ensure immediate transmission to the employer of results that require the employer to prevent the employee from performing a safety-sensitive function.

(3) If the initial transmission is not in writing (*e.g.*, by telephone), the employer shall establish a mechanism to verify the identity of the BAT providing the information.

(4) If the initial transmission is not in writing, the BAT shall follow the initial transmission by providing to the employer the employer's copy of the breath alcohol testing form. The employer shall store the information so as to ensure that confidentiality is maintained as required by § 40.81.

§ 40.67 Refusals to test and uncompleted tests.

(a) Refusal by an employee to complete and sign the breath alcohol testing form (Step 2), to provide breath, to provide an adequate amount of breath, or otherwise to cooperate with the testing process in a way that prevents the completion of the test, shall be noted by the BAT in the remarks section of the form. The testing process shall be terminated and the BAT shall immediately notify the employer.

(b) If a screening or confirmation test cannot be completed, or if an event occurs that would invalidate the test, the BAT shall, if practicable, begin a new screening or confirmation test, as applicable, using a new breath alcohol testing form with a new sequential test number (in the case of a screening test conducted on an EBT that meets the requirements of § 40.53(b) or in the case of a confirmation test).

§ 40.69 Inability to provide an adequate amount of breath.

(a) This section sets forth procedures to be followed in any case in which an employee is unable, or alleges that he or she is unable, to provide an amount of breath sufficient to permit a valid breath test because of a medical condition.

(b) The BAT shall again instruct the employee to attempt to provide an adequate amount of breath. If the employee refuses to make the attempt, the BAT shall immediately inform the employer.

(c) If the employee attempts and fails to provide an adequate amount of breath, the BAT shall so note in the "Remarks" section of the breath alcohol testing form and immediately inform the employer.

(d) If the employee attempts and fails to provide an adequate amount of breath, the employer shall proceed as follows:

(1) [Reserved]

(2) The employer shall direct the employee to obtain, as soon as practical after the attempted provision of breath, an evaluation from a licensed physician who is acceptable to the employer concerning the employee's medical ability to provide an adequate amount of breath.

(i) If the physician determines, in his or her reasonable medical judgment, that a medical condition has, or with a high degree of probability, could have, precluded the employee from providing an adequate amount of breath, the employee's failure to provide an adequate amount of breath shall not be deemed a refusal to take a test. The physician shall provide to the employer a written statement of the basis for his or her conclusion.

(ii) If the licensed physician, in his or her reasonable medical judgment, is unable to make the determination set forth in paragraph (d)(2)(i) of this section the employee's failure to provide an adequate amount of breath shall be regarded as a refusal to take a test. The licensed physician shall provide a written statement of the basis for his or her conclusion to the employer.

§§ 40.71–40.77 [Reserved]

§ 40.79 Invalid tests.

(a) A breath alcohol test shall be invalid under the following circumstances:

(1) The next external calibration check of an EBT produces a result that differs by more than the tolerance stated in the QAP from the known value of the test standard. In this event, every test result of 0.02 or above obtained on the device since the last valid external calibration check shall be invalid;

(2) The BAT does not observe the minimum 15-minute waiting period prior to the confirmation test, as provided in § 40.65(b);

(3) The BAT does not perform an air blank of the EBT before a confirmation test, or an air blank does not result in a reading of 0.00 prior to or after the administration of the test, as provided in § 40.65;

(4) The BAT does not sign the form as required by §§ 40.63 and 40.65;

(5) The BAT has failed to note on the remarks section of the form that the employee has failed or refused to sign the form following the recording or printing on or attachment to the form of the test result;

(6) An EBT fails to print a confirmation test result; or

(7) On a confirmation test and, where applicable, on a screening test, the sequential test number or alcohol concentration displayed on the EBT is not the same as the sequential test number or alcohol concentration on the printed result.

(b) [Reserved]

§ 40.81 Availability and disclosure of alcohol testing information about individual employees.

(a) Employers shall maintain records in a secure manner, so that disclosure of information to unauthorized persons does not occur.

(b) Except as required by law or expressly authorized or required in this section, no employer shall release covered employee information that is contained in the records required to be maintained by this part or by DOT agency alcohol misuse rules.

(c) An employee subject to testing is entitled, upon written request, to obtain copies of any records pertaining to the employee's use of alcohol, including any records pertaining to his or her alcohol tests. The employer shall promptly provide the records requested by the employee. Access to an employee's records shall not be contingent upon payment for records other than those specifically requested.

(d) Each employer shall permit access to all facilities utilized in complying with the requirements of this part and DOT agency alcohol misuse rules to the Secretary of Transportation, any DOT agency with regulatory authority over the employer, or a state agency with regulatory authority over the employer (as authorized by DOT agency regulations).

(e) When requested by the Secretary of Transportation, any DOT agency with regulatory authority over the employer, or a state agency with regulatory authority over the employer (as authorized by DOT agency regulations), each employer shall make available copies of all results for employer alcohol testing conducted under the requirements of this part and any other information pertaining to the employer's alcohol misuse prevention program. The information shall include name-specific alcohol test results, records and reports.

(f) When requested by the National Transportation Safety Board as part of an accident investigation, an employer shall disclose information related to the employer's administration of any post-accident alcohol tests administered following the accident under investigation.

(g) An employer shall make records available to a subsequent employer upon receipt of a written request from a covered employee. Disclosure by the subsequent employer is permitted only as expressly authorized by the terms of the employee's written request.

(h) An employer may disclose information required to be maintained under this part pertaining to a covered employee to that employee or to the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual, and arising from the results of an alcohol test administered under the requirements of this part, or from the employer's determination that the employee engaged in conduct prohibited by a DOT agency alcohol misuse regulation (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the employee).

(i) An employer shall release information regarding a covered employee's records as directed by the specific, written consent of the employee authorizing release of the information to an identified person. Release of such information is permitted only in accordance with the terms of the employee's consent.

§ 40.83 Maintenance and disclosure of records concerning EBTs and BATs.

(a) Each employer or its agent shall maintain the following records for two years:

(1) Records of the inspection and maintenance of each EBT used in employee testing;

(2) Documentation of the employer's compliance with the QAP for each EBT it uses for alcohol testing under this part;

(3) Records of the training and proficiency testing of each BAT used in employee testing;

(4) The log books required by § 40.59(c).

(b) Each employer or its agent shall maintain for five years records pertaining to the calibration of each EBT used in alcohol testing under this part, including records of the results of external calibration checks.

(c) Records required to be maintained by this section shall be disclosed on the same basis as provided in § 40.81.

Appendix A to Subpart C of Part 40—The Breath Alcohol Testing Form

BILLING CODE 4910-62-U

U.S. Department of Transportation (DOT) Breath Alcohol Testing Form

[THE INSTRUCTIONS FOR COMPLETING THIS FORM ARE ON THE BACK OF COPY 3]

► STEP 1: TO BE COMPLETED BY BREATH ALCOHOL TECHNICIAN

A. Employee Name _____
(PRINT) (First, M.I., Last)

B. SSN or Employee ID No. _____

C. Employer Name, _____
Address, & _____
Telephone No. _____

_____ () _____
Telephone Number

D. Reason for Test: ☐ Pre-employment ☐ Random ☐ Reasonable Suspicion/Cause ☐ Post-accident ☐ Return to Duty ☐ Follow-up

► STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to breath alcohol testing required by U.S. Department of Transportation regulations and that the identifying information provided on this form is true and correct.

Signature of Employee

Date / /
Month Day Year

► STEP 3: TO BE COMPLETED BY BREATH ALCOHOL TECHNICIAN

I certify that I have conducted breath alcohol testing on the above named individual in accordance with the procedures established in the U.S. Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing devices identified, and that the results are as recorded.

Screening test: Complete only if the testing device is not designed to print the following.

Test No.	Testing Device Name	Testing Device Serial Number	Time	AM PM	Result
Confirmation test: Confirmation test results <u>MUST</u> be affixed to the back of each copy of this form.					
Remarks: _____					

(PRINT) Breath Alcohol Technician's Name (First, M.I., Last)		Signature of Breath Alcohol Technician		Date	Month / Day / Year

► STEP 4: TO BE COMPLETED BY EMPLOYEE

I certify that I have submitted to breath alcohol testing and the results are as recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment if the results are 0.02 or greater.

Signature of Employee

Date / /
 Month Day Year

**AFFIX SCREENING TEST RESULTS HERE
(IF APPLICABLE)**

USE TAMPER-EVIDENT TAPE

AFFIX CONFIRMATION TEST RESULTS HERE

USE TAMPER-EVIDENT TAPE

PAPERWORK REDUCTION ACT NOTICE (as required by 5 CFR 1320.21)

Public reporting burden for this collection of information is estimated for each respondent to average: 1 minute/employee, 4 minutes/Breath Alcohol Technician. Individuals may send comments regarding these burden estimates, or any other aspect of this collection of information, including suggestions for reducing the burden, to U.S. Department of Transportation, Drug Enforcement and Program Compliance, Room 9404, 400 Seventh St., SW, Washington, D.C. 20590 or Office of Management and Budget, Paperwork Reduction Project, Room 3001, 725 Seventeenth St., NW, Washington, D.C. 20503.

COPY 1 - ORIGINAL - BREATH ALCOHOL TECHNICIAN RETAINS

U.S. Department of Transportation (DOT) Breath Alcohol Testing Form

[THE INSTRUCTIONS FOR COMPLETING THIS FORM ARE ON THE BACK OF COPY 3]

► STEP 1: TO BE COMPLETED BY BREATH ALCOHOL TECHNICIAN

A. Employee Name _____ (PRINT) (First, M.I., Last)
B. SSN or Employee ID No. _____
C. Employer Name, _____ Address, & _____ Telephone No. _____ _____ _____ _____ Telephone Number
D. Reason for Test: <input type="checkbox"/> Pre-employment <input type="checkbox"/> Random <input type="checkbox"/> Reasonable Suspicion/Cause <input type="checkbox"/> Post-accident <input type="checkbox"/> Return to Duty <input type="checkbox"/> Follow-up

► STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to breath alcohol testing required by U.S. Department of Transportation regulations and that the identifying information provided on this form is true and correct.

Signature of Employee

Date ____/____/____
Month Day Year

► STEP 3: TO BE COMPLETED BY BREATH ALCOHOL TECHNICIAN

I certify that I have conducted breath alcohol testing on the above named individual in accordance with the procedures established in the U.S. Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing devices identified, and that the results are as recorded.

Screening test: Complete only if the testing device is not designed to print the following.

Test No.	Testing Device Name	Testing Device Serial Number	Time	AM PM	Result
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Confirmation test: Confirmation test results MUST be affixed to the back of each copy of this form.

Remarks: _____

(PRINT) Breath Alcohol Technician's Name (First, M.I., Last)

Signature of Breath Alcohol Technician

Date ____/____/____
Month Day Year

► STEP 4: TO BE COMPLETED BY EMPLOYEE

I certify that I have submitted to breath alcohol testing and the results are as recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment if the results are 0.02 or greater.

Signature of Employee

Date ____/____/____
Month Day Year

COPY 2 - EMPLOYEE RETAINS

OMB No. 2105-0529

**AFFIX SCREENING TEST RESULTS HERE
(IF APPLICABLE)**

USE TAMPER-EVIDENT TAPE

AFFIX CONFIRMATION TEST RESULTS HERE

USE TAMPER-EVIDENT TAPE

Privacy Act Statement

(applicable in those cases where completed Breath Alcohol Testing Forms are retained in a Federal Privacy Act system of records)

Except for your Social Security Number (SSN), submission of the information on the front side of this form is mandatory. Incomplete submission of the information, failure to provide an adequate breath specimen for testing without a valid medical explanation, engaging in conduct that clearly obstructs the testing process, or failure to sign the certification statements on the front side of this form may result in delay or denial of your application for employment/appointment, your inability to resume performing safety-sensitive duties, removal from a safety-sensitive position, or other disciplinary action.

The authority for obtaining the breath specimen required by the U.S. Department of Transportation is the Omnibus Transportation Employee Testing Act of 1991, Pub. L. 102-143, Title V. The principal purpose for which the information sought is to be used is to ensure that you have submitted to breath alcohol testing and to ensure that you are promptly notified in the event of noncompliance with the U.S. Department of Transportation breath alcohol testing requirements.

Submission of your SSN is not required by law and is voluntary. If you object to the use of your SSN in this form, you will not be denied any right, benefit, or privilege provided by law; a substitute number or other identifier will be assigned.

The information provided in this form may be disclosed, as a routine use, to a Federal, State, or local agency for authorized investigative or enforcement purposes or to a court or an administrative tribunal when the Government or one of its agencies is a party to a judicial proceeding before the court or involved in administrative proceedings before the tribunal.

PAPERWORK REDUCTION ACT NOTICE (as required by 5 CFR 1320.21)

Public reporting burden for this collection of information is estimated for each respondent to average: 1 minute/employee, 4 minutes/Breath Alcohol Technician. Individuals may send comments regarding these burden estimates, or any other aspect of this collection of information, including suggestions for reducing the burden, to U.S. Department of Transportation, Drug Enforcement and Program Compliance, Room 9404, 400 Seventh St., SW, Washington, D.C. 20590 or Office of Management and Budget, Paperwork Reduction Project, Room 3001, 725 Seventeenth St., NW, Washington, D.C. 20503.

THE INSTRUCTIONS FOR COMPLETING THIS FORM ARE ON THE BACK OF COPY 31

Date Month Day Year

**AFFIX SCREENING TEST RESULTS HERE
(IF APPLICABLE)**

USE TAMPER-EVIDENT TAPE

AFFIX CONFIRMATION TEST RESULTS HERE

USE TAMPER-EVIDENT TAPE

INSTRUCTIONS FOR COMPLETING THE U.S. DEPARTMENT OF TRANSPORTATION BREATH ALCOHOL TESTING FORM

NOTE: Use a ballpoint pen, press hard, and check all copies for legibility.

STEP 1 The Breath Alcohol Technician (BAT) completes the information required in this step. Be sure to print the employee's name and check the box identifying the reason for the test.

NOTE: If the employee refuses to provide SSN or I.D. number, be sure to indicate this in the remarks section in STEP 3. Proceed with STEP 2.

STEP 2 Instruct the employee to read, sign, and date the employee certification statement in STEP 2.

NOTE: If the employee refuses to sign the certification statement, do not proceed with the alcohol test. Contact the designated employer representative.

STEP 3 The Breath Alcohol Technician (BAT) completes the information required in this step. After conducting the alcohol screening test, do the following (as appropriate):

If the breath testing device used in conducting the screening test is not capable of printing the screening test information located on the front of this form (test number, testing device name, testing device serial number, time of test and results), complete this information in the space provided on the front of this form.

NOTE: Be sure to enter the result of the test exactly as it is indicated on the breath testing device, i.e., 0.00, 0.02, 0.04, etc.

OR, If the breath testing device used in conducting the screening test is capable of printing the screening test information located on the front of this form, affix the printed information in the space provided above. Be sure to use tamper-evident tape.

If the results of the screening test are less than 0.02, print, sign your name, and enter today's date in the space provided. Go to STEP 4.

If the results of the screening test are 0.02 or greater, a confirmation test must be administered in accordance with DOT regulations. An **EVIDENTIAL BREATH TESTING** device that is capable of printing confirmation test information must be used in conducting this test.

After conducting the alcohol confirmation test, affix the printed information in the space provided above. Be sure to use tamper-evident tape.

Print, sign your name, and enter the date in the space provided. Go to STEP 4.

STEP 4 Instruct the employee to read, sign, and date the employee certification statement in STEP 4.

NOTE: If the employee refuses to sign the certification statement in STEP 4, be sure to indicate this in the remarks section in STEP 3.

Retain Copy 1 (white page) for BAT records.

Give Copy 2 (green page) to the employee.

Forward Copy 3 (blue page) to the employer.

PAPERWORK REDUCTION ACT NOTICE (as required by 5 CFR 1320.21)

Public reporting burden for this collection of information is estimated for each respondent to average: 1 minute/employee, 4 minutes/Breath Alcohol Technician. Individuals may send comments regarding these burden estimates, or any other aspect of this collection of information, including suggestions for reducing the burden, to U.S. Department of Transportation, Drug Enforcement and Program Compliance, Room 9404, 400 Seventh St., SW, Washington, D.C. 20590 or: Office of Management and Budget, Paperwork Reduction Project, Room 3001, 725 Seventeenth St., NW, Washington, D.C. 20503.

COPY 3 - FORWARD TO THE EMPLOYER

49 CFR Part 40 (December 1, 1989)

49 CFR PART 40
PROCEDURES FOR TRANSPORTATION WORKPLACE
DRUG TESTING PROGRAMS

Sec.

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Appendix A TO PART 40-DRUG TESTING CUSTODY AND CONTROL FORM

AUTHORITY: 49 U.S.C. 102, 301, 322

Source: 54 FR 49866, Dec. 1, 1989, unless otherwise noted.

§ 40.1 Applicability

This part applies to transportation employers (including self-employed individuals) conducting drug urine testing programs pursuant to regulations issued by agencies of the Department of Transportation and to such transportation employers' officers, employees, agents and contractors, to the extent and in the manner provided in DOT agency regulations.

§ 40.3 Definitions

For purposes of this part the following definitions apply:

Aliquot. A portion of a specimen used for testing.

Blind sample or blind performance test specimen. A urine specimen submitted to a laboratory for quality control testing purposes, with a fictitious identifier, so that the laboratory cannot distinguish it from employee specimens, and which is spiked with known quantities of specific drugs or which is blank, containing no drugs.

Chain of custody. Procedures to account for the integrity of each urine specimen by tracking its handling and storage from point of specimen collection to final disposition of the specimen. These procedures shall require that an appropriate drug testing custody form (see §40.23(a)) be used from time of collection to receipt by the laboratory and that upon receipt by the laboratory an appropriate laboratory chain of custody form(s) account(s) for the sample or sample aliquots within the laboratory.

Collection container. A container into which the employee urinates to provide the urine sample used for a drug test.

Collection site. A place designated by the employer where individuals present themselves for the purpose of providing a specimen of their urine to be analyzed for the presence of drugs.

Collection site person. A person who instructs and assists individuals at a collection site and who receives and makes an initial examination of the urine specimen provided by those individuals.

Confirmatory test. A second analytical procedure to identify the presence of a specific drug or metabolite which is independent of the initial test and which uses a different technique and chemical principle from that of the initial test in order to ensure reliability and accuracy. (Gas chromatography/mass spectrometry (GC/MS) is the only authorized confirmation method for cocaine, marijuana, opiates, amphetamines, and phencyclidine.)

DHHS. The Department of Health and Human Services or any designee of the Secretary, Department of Health and Human Services.

DOT agency. An agency (or "operating administration") of the United States Department of Transportation administering regulations requiring compliance with this part, including the United States Coast Guard, the Federal Aviation Administration, the Federal Railroad Administration, the Federal Highway Administration, the Urban Mass Transportation Administration and the Research and Special Programs Administration.

Employee. An individual designated in a DOT agency regulation as subject to drug urine testing and the donor of a specimen under this part. As used in this part "employee" includes an applicant for employment. "Employee" and "individual" or "individual to be tested" have the same meaning for purposes of this part.

Employer. An entity employing one or more employees that is subject to DOT agency regulations requiring compliance with this part. As used in this part, "employer" includes an industry consortium or joint enterprise comprised of two or more employing entities, but no single employing entity is relieved of its responsibility for compliance with this part by virtue of participation in such a consortium or joint enterprise.

Initial test (also known as screening test). An immunoassay screen to eliminate "negative" urine specimens from further consideration.

Medical Review Officer (MRO). A licensed physician responsible for receiving laboratory results generated by an employer's drug testing program who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's confirmed positive test result together with his or her medical history and any other relevant biomedical information.

Secretary. The Secretary of Transportation or the Secretary's designee.

Shipping container. A container capable of being secured with a tamper proof seal that is used for transfer of one or more specimen bottle(s) and associated documentation from the collection site to the laboratory.

Specimen bottle. The bottle which, after being labeled and sealed according to the procedures in this part, is used to transmit a urine sample to the laboratory.

§§ 40.5-40.19 [Reserved]

§ 40.21 The drugs

- (a) DOT agency drug testing programs require that employers test for marijuana, cocaine, opiates, amphetamines and phencyclidine.
- (b) An employer may include in its testing protocols other controlled substances or alcohol only pursuant to a DOT agency approval, if testing for those substances is authorized under agency regulations and if the DHHS has established an approved testing protocol and positive threshold for each such substance.
- (c) Urine specimens collected under DOT agency regulations requiring compliance with this part may only be used to test for controlled substances designated or approved for testing as described in this section and shall not be used to conduct any other analysis or test unless otherwise specifically authorized by DOT agency regulations.
- (d) This section does not prohibit procedures reasonably incident to analysis of the specimen for controlled substances (e.g., determination of pH or tests for specific gravity, creatinine concentration or presence of adulterants).

§ 40.23 Preparation for testing

The employer and certified laboratory shall develop and maintain a clear and well-documented procedure for collection, shipment, and accessioning of urine specimens under this part. Such a procedure shall include, at a minimum, the following:

- (a) Utilization of a standard drug testing custody and control form (carbonless manifold). The form shall be a multiple-part, carbonless record form with an original (copy 1), and a "second original" (copy 2), both of which shall accompany the specimen to the laboratory. Copies shall be provided for the Medical Review Officer (copy 3, to go directly to the MRO), the donor (copy 4), the collector (copy 5), and the employer representative (copy 6). If the employer desires to exercise the split sample option, then an additional copy of the urine custody and control form is required. This copy (copy 7) shall be the "split specimen original," and is to accompany the split specimen to the same lab, a second lab, or an employer storage site. There must be a positive link established between the first specimen and the split specimen through the specimen identification number; the split specimen identification number shall be an obvious derivative of the first specimen identification number. The form should be a permanent record on which identifying data on the donor, and on the specimen collection and transfer process, is

retained. The form shall be constructed to display, at a minimum, the following elements, which shall appear on its respective parts as indicated:

- (1) The following information shall appear on all parts of the form:
 - (i) A preprinted specimen identification number, which shall be unique to the particular collection. If the split sample option is exercised, the preprinted specimen identification number for split specimen shall be an obvious derivative of the first specimen; e.g., first specimen identification number suffixed "A," split specimen suffixed "B."
 - (ii) A block specifying the donor's employee identification number or Social Security number, which shall be entered by the collector.
 - (iii) A block specifying the employer's name, address, and identification number.
 - (iv) A block specifying the Medical Review Officer's name and address.
 - (v) Specification for which drugs the specimen identified by this form will be tested.
 - (vi) Specification for the reason for which this test conducted (pre-employment, random, etc.), which shall be entered by the collector.
 - (vii) A block specifying whether or not the collector read the temperature within 4 minutes, and then notation, by the collector, that the temperature of specimen just read is within the range of 32.5-37.7C/90.5-99.8F; if not within the acceptable range, an area is provided to record the actual temperature.
 - (viii) A chain-of-custody block providing areas to enter the following information for each transfer of possession: Purpose of change; released by (signature/print name); received by (signature/print name); date. The words "Provide specimen for testing" and "DONOR" shall be preprinted in the initial spaces.
 - (ix) Information to be completed by the collector: Collector's name; date of collection; location of the collection site; a space for remarks at which unusual circumstances may be described; notation as to whether or not the split specimen was taken in accordance with Federal requirements if the option to offer the split specimen was exercised by the employer; and a certification statement as set forth below and a signature block with date which shall be completed by the collector:

I certify that the specimen identified on this form is the specimen presented to me by the donor providing the certification on Copy 3 of this form, that it bears the same identification number as that set forth above, and that it has been collected,

labelled and sealed as in accordance with applicable Federal requirements.

- (2) Information to be provided by the laboratory after analysis, which shall appear on parts 1, 2, and 7 (if applicable) of the form only: Accession number; laboratory name; address; a space for remarks; specimen results; and certification statement as set forth below, together with spaces to enter the printed name and signature of the certifying laboratory official and date:

I certify that the specimen identified by this accession number is the same specimen that bears the identification number set forth above, that the specimen has been examined upon receipt, handled, and analyzed in accordance with applicable Federal requirements, and that the results set forth below are for that specimen.

- (3) A block to be completed by the Medical Review Officer (MRO), after the review of the specimen, which shall appear on parts 1, 2, and 7 (if applicable) of the form only, provides for the MRO's name, address, and certification, to read as follows, together with spaces for signature and date:

I have reviewed the laboratory results for the specimen identified by this form in accordance with applicable Federal requirements. My final determination/verification is:

- (4) Information to be provided by the donor, which shall appear on parts 3 through 6 of the form only: Donor name (printed); daytime phone number; date of birth; and certification statement as set forth below, together with a signature block with date which shall be completed by the donor:

I certify that I provided my urine specimen to the collector; that the specimen bottle was sealed with a tamper-proof seal in my presence; and that the information provided on this form and on the label affixed to the specimen bottle is correct.

- (5) A statement to the donor which shall appear only on parts 3 and 4 of the form, as follows:

Should the results of the laboratory tests for the specimen identified by this form be confirmed positive, the Medical Review Officer will contact you to ask about prescriptions and over-the-counter medications you may have taken. Therefore, you may want to make a list of those medications as a "memory jogger." THIS LIST IS NOT NECESSARY. If you choose to make a list, do so either on a separate piece of paper or on the back of your copy (Copy 4—Donor) of this form—DO NOT LIST ON THE BACK OF ANY OTHER COPY OF THE FORM. TAKE YOUR COPY WITH YOU.

A form meeting the requirements of this paragraph is displayed at Appendix A to this part.

- (6) The drug testing custody and control form may include such additional information as may be required for billing or other legitimate purposes necessary to the collection, provided that personal identifying information on the donor (other than the social security number) may not be provided to the laboratory. Donor medical information may appear only on the copy provided to the donor.
- (b)
 - (1) Use of a clean, single-use specimen bottle that is securely wrapped until filled with the specimen. A clean, single-use collection container (e.g., disposable cup or sterile urinal) that is securely wrapped until used may also be employed. *If urination is directly into the specimen bottle*, the specimen bottle shall be provided to the employee still sealed in its wrapper or shall be unwrapped in the employee's presence immediately prior to its being provided. *If a separate collection container is used for urination*, the collection container shall be provided to the employee still sealed in its wrapper or shall be unwrapped in the employee's presence immediately prior to its being provided; and the collection site person shall unwrap the specimen bottle in the presence of the employee at the time the urine specimen is presented.
 - (2) Use of a tamperproof sealing system, designed in a manner such to ensure against undetected opening. The specimen bottle shall be identified with a unique identifying number identical to that appearing on the urine custody and control form, and space shall be provided to initial the bottle affirming its identity. For purposes of clarity, this part assumes use of a system made up of one or more preprinted labels and seals (or a unitary label/seal), but use of other, equally effective technologies is authorized.
- (c) Use of a shipping container in which the specimen and associated paperwork may be transferred and which can be sealed and initialed to prevent undetected tampering. In the split specimen option is exercised, the split specimen and associated paperwork shall be sealed in a shipping (or storage) container and initialed to prevent undetected tampering.
- (d) Written procedures, instructions and training shall be provided as follows:
 - (1) Employer collection procedures and training shall clearly emphasize that the collection site person is responsible for maintaining the integrity of the specimen collection and transfer process, carefully ensuring the modesty and privacy of the donor, and is to avoid any conduct or remarks that might be construed as accusatorial or otherwise offensive or inappropriate.
 - (2) A collection site person shall have successfully completed training to carry out this function or shall be a licensed medical professional or technician who is

provided instructions for collection under this part and certifies completion as required in this part

- (i) A non-medical collection site person shall receive training in compliance with this part and shall demonstrate proficiency in the application of this part prior to serving as a collection site person. A medical professional, technologist or technician licensed or otherwise approved to practice in the jurisdiction in which the collection takes place is not required to receive such training if that person is provided instructions described in this part and performs collections in accordance with those instructions.
 - (ii) Collection site persons shall be provided with detailed, clear instructions on the collection of specimens in compliance with this part. Employer representatives and donors subject to testing shall also be provided standard written instructions setting forth their responsibilities.
- (3) Unless it is impracticable for any other individual to perform this function, a direct supervisor of an employee shall not serve as the collection site person for a test of the employee. If the rules of a DOT agency are more stringent than this provision regarding the use of supervisors as collection site personnel, the DOT agency rules shall prevail with respect to testing to which they apply.
 - (4) In any case where a collection is monitored by non-medical personnel or is directly observed, the collection site person shall be of the same gender as the donor. A collection is monitored for this purpose if the enclosure provides less than complete privacy for the donor (e.g., if a restroom stall is used and the collection site person remains in the restroom, or if the collection site person is expected to listen for use of unsecured sources of water.)

§ 40.25 Specimen collection procedures

(a) *Designation of collection site.*

- (1) Each employer drug testing program shall have one or more designated collection sites which have all necessary personnel, materials, equipment, facilities and supervision to provide for the collection, security, temporary storage, and shipping or transportation of urine specimens to a certified drug testing laboratory. An independent medical facility may also be utilized as a collection site provided the other applicable requirements of this part are met.
- (2) A designated collection site may be any suitable location where a specimen can be collected under conditions set forth in this part, including a properly equipped mobile facility. A designated collection site shall be a location having an enclosure within which private urination can occur, a toilet for completion of urination (unless a single-use collector is used with sufficient capacity to contain the void), and a suitable clean surface for writing. The site must also have a

source of water for washing hands, which, if practicable, should be external to the enclosure where urination occurs.

- (b) *Security.* The purpose of this paragraph is to prevent unauthorized access which could compromise the integrity of the collection process or the specimen.
- (1) Procedures shall provide for the designated collection site to be secure. If a collection site facility is dedicated solely to urine collection, it shall be secure at all times. If a facility cannot be dedicated solely to drug testing, the portion of the facility used for testing shall be secured during drug testing.
 - (2) A facility normally used for other purposes, such as a public rest room or hospital examining room, may be secured by visual inspection to ensure other persons are not present and undetected access (e.g., through a rear door not in the view of the collection site person) is not possible. Security during collection may be maintained by effective restriction of access to collection materials and specimens. In the case of a public rest room, the facility must be posted against access during the entire collection procedure to avoid embarrassment to the employee or distraction of the collection site person.
 - (3) If it is impractical to maintain continuous physical security of a collection site from the time the specimen is presented until the sealed mailer is transferred for shipment, the following minimum procedures shall apply. The specimen shall remain under the direct control of the collection site person from delivery to its being sealed in the mailer. The mailer shall be immediately mailed, maintained in secure storage, or remain until mailed under the personal control of the collection site person.
- (c) *Chain of custody.* The chain of custody block of the drug testing custody and control form shall be properly executed by authorized collection site personnel upon receipt of specimens. Handling and transportation of urine specimens from one authorized individual or place to another shall always be accomplished through chain of custody procedures. Every effort shall be made to minimize the number of persons handling specimens.
- (d) *Access to authorized personnel only.* No unauthorized personnel shall be permitted in any part of the designated collection site where urine specimens are collected or stored. Only the collection site person may handle specimens prior to their securement in the mailing container or monitor or observe specimen collection (under the conditions specified in this part). In order to promote security of specimens, avoid distraction of the collection site person and ensure against any confusion in the identification of specimens, the collection site person shall have only one donor under his or her supervision at any time. For this purpose, a collection procedure is complete when the urine bottle has been sealed and initialled, the drug testing custody and control form has been executed, and the employee has departed the site (or, in the case of an employee who was unable to provide a complete specimen, has entered a waiting area).

(e) *Privacy.*

- (1) Procedures for collecting urine specimens shall allow individual privacy unless there is a reason to believe that a particular individual may alter or substitute the specimen to be provided, as further described in this paragraph.
- (2) For purposes of this part, the following circumstances are the exclusive grounds constituting a reason to believe that the individual may alter or substitute the specimen:
 - (i) The employee has presented a urine specimen that falls outside the normal temperature range (32.5°-37.7°C/90.5°-99.8°F), and
 - (A) The employee declines to provide a measurement of oral body temperature, as provided in paragraph (f)(14) of the part; or
 - (B) Oral body temperature varies by more than 1°C/1.8°F from the temperature of the specimen;
 - (ii) The last urine specimen provided by the employee (i.e., on a previous occasion) was determined by the laboratory to have a specific gravity of less than 1.003 and a creatinine concentration below 0.2g/L;
 - (iii) The collection site person observes conduct clearly and unequivocally indicating an attempt to substitute or adulterate the sample (e.g., substitute urine in plain view, blue dye in specimen presented, etc.); or
 - (iv) The employee has previously been determined to have used a controlled substance without medical authorization and the particular test was being conducted under a DOT agency regulation providing for follow-up testing upon or after return to service.
- (3) A higher-level supervisor of the collection site person, or a designated employer representative, shall review and concur in advance with any decision by a collection site person to obtain a specimen under the direct observation of a same gender collection site person based upon the circumstances described in subparagraph (2) of this paragraph.

(f) *Integrity and identity of specimen.* Employers shall take precautions to ensure that a urine specimen is not adulterated or diluted during the collection procedure and that information on the urine bottle and on the urine custody and control form can identify the individual from whom the specimen was collected. The following minimum precautions shall be taken to ensure that unadulterated specimens are obtained and correctly identified:

- (1) To deter the dilution of specimens at the collection site, toilet bluing agents shall be placed in toilet tanks wherever possible, so the reservoir of water in the toilet bowl always remains blue. Where practicable, there shall be no other source of water (e.g., shower or sink) in the enclosure where urination occurs.

If there is another source of water in the enclosure it shall be effectively secured or monitored to ensure it is not used as a source for diluting the specimen.

- (2) When an individual arrives at the collection site, the collection site person shall ensure that the individual is positively identified as the employee selected for testing (e.g., through presentation of photo identification or identification by the employer's representative). If the individual's identity cannot be established, the collection site person shall not proceed with the collection. If the employee requests, the collection site person shall show his/her identification to the employee.
- (3) If the individual fails to arrive at the assigned time, the collection site person shall contact the appropriate authority to obtain guidance on the action to be taken.
- (4) The collection site person shall ask the individual to remove any unnecessary outer garments such as a coat or jacket that might conceal items or substances that could be used to tamper with or adulterate the individual's urine specimen. The collection site person shall ensure that all personal belongings such as a purse or briefcase remain with the outer garments. The individual may retain his or her wallet. If the employee requests it, the collection site personnel shall provide the employee a receipt for any personal belongings.
- (5) The individual shall be instructed to wash and dry his or her hands prior to urination.
- (6) After washing hands, the individual shall remain in the presence of the collection site person and shall not have access to any water fountain, faucet, soap dispenser, cleaning agent or any other materials which could be used to adulterate the specimen.
- (7) The individual may provide his/her specimen in the privacy of a stall or otherwise partitioned area that allows for individual privacy. The collection site person shall provide the individual with a specimen bottle or collection container, if applicable, for this purpose.
- (8) The collection site person shall note any unusual behavior or appearance on the urine custody and control form.
- (9) In the exceptional event that an employer-designated collection site is not accessible and there is an immediate requirement for specimen collection (e.g., circumstances require a post-accident test), a public rest room may be used according to the following procedures: A collection site person of the same gender as the individual shall accompany the individual into the public rest room which shall be made secure during the collection procedure. If possible, a toilet bluing agent shall be placed in the bowl and any accessible toilet tank. The collection site person shall remain in the rest room, but outside the stall, until the specimen is collected. If no bluing agent is available to deter specimen dilution, the collection site person shall instruct the individual not to flush the

toilet until the specimen is delivered to the collection site person. After the collection site person has possession of the specimen, the individual will be instructed to flush the toilet and to participate with the collection site person in completing the chain of custody procedures.

- (10) (i) Upon receiving the specimen from the individual, the collection site person shall determine if it contains at least 60 milliliters of urine. If the individual is unable to provide a 60 milliliters of urine, the collection site person shall direct the individual to drink fluids and, after a reasonable time, again attempt to provide a complete sample using a fresh specimen bottle (and fresh collection container, if employed). The original specimen shall be discarded. If the employee is still unable to provide a complete specimen, the following rules apply:
 - (A) In the case of a post-accident test or test for reasonable cause (as defined by the DOT agency), the employee shall remain at the collection site and continue to consume reasonable quantities of fluids until the specimen has been provided or until the expiration of a period up to 8 hours from the beginning of the collection procedure.
 - (B) In the case of a preemployment test, random test, periodic test or other test not for cause (as defined by the DOT agency), the employer may elect to proceed as specified in paragraph (f)(10)(i)(A) of this section (consistent with any applicable restrictions on hours of service) or may elect to discontinue the collection and conduct a subsequent collection at a later time.
 - (C) If the employee cannot provide a complete sample within the up to 8-hour period or at the subsequent collection, as applicable, then the employer's MRO shall refer the individual for a medical evaluation to develop pertinent information concerning whether the individual's inability to provide a specimen is genuine or constitutes a refusal to provide a specimen. (In preemployment testing, if the employer does not wish to hire the individual, the MRO is not required to make such a referral.) Upon completion of the examination, the MRO shall report his or her conclusions to the employer in writing.
- (ii) The employer may, but is not required to, use a "split sample" method of collection.
 - (A) The donor shall urinate into a collection container, which the collection site person, in the presence of the donor, after determining specimen temperature, pours into two specimen bottles.
 - (B) The first bottle is to be used for the DOT-mandated test, and 60 ml of urine shall be poured into it. If there is no additional

urine available for the second specimen bottle, the first specimen bottle shall nevertheless be processed for testing.

- (C) Up to 60 ml of the remainder of the urine shall be poured into the second specimen bottle.
 - (D) All requirements of this part shall be followed with respect to both samples, including the requirement that a copy of the chain of custody form accompany each bottle processed under "split sample" procedures.
 - (E) Any specimen collected under "split sample" procedures must be stored in a secured, refrigerated environment and an appropriate entry made in the chain of custody form.
 - (F) If the test of the first bottle is positive, the employee may request that the MRO direct that the second bottle be tested in a DHHS-certified laboratory for presence of the drug(s) for which a positive result was obtained in the test of the first bottle. The result of this test is transmitted to the MRO without regard to the cutoff values of 40.29. The MRO shall honor such a request if it is made within 72 hours of the employee's having actual notice that he or she tested positive.
 - (G) Action required by DOT regulations as the result of a positive drug test (e.g., removal from performing a safety-sensitive function) is not stayed pending the result of the second test.
 - (H) If the result of the second test is negative, the MRO shall cancel the test.
- (11) After the specimen has been provided and submitted to the collection site person, the individual shall be allowed to wash his or her hands.
 - (12) Immediately after the specimen is collected, the collection site person shall measure the temperature of the specimen. The temperature measuring device used must accurately reflect the temperature of the specimen and not contaminate the specimen. The time from urination to temperature measure is critical and in no case shall exceed 4 minutes.
 - (13) A specimen temperature outside the range of 32.5°-37.7°C/90.5°-99.8°F constitutes a reason to believe that the individual has altered or substituted the specimen (see paragraph (e)(2)(i) of this section). In such cases, the individual supplying the specimen may volunteer to have his or her oral temperature taken to provide evidence to counter the reason to believe the individual may have altered or substituted the specimen.
 - (14) Immediately after the specimen is collected, the collection site person shall also inspect the specimen to determine its color and look for any signs of

contaminants. Any unusual findings shall be noted on the urine custody and control form.

- (15) All specimens suspected of being adulterated shall be forwarded to the laboratory for testing.
- (16) Whenever there is reason to believe that a particular individual has altered or substituted the specimen as described in paragraph (e)(2) (i) or (iii) of this section, a second specimen shall be obtained as soon as possible under the direct observation of a same gender collection site person.
- (17) Both the individual being tested and the collection site person shall keep the specimen in view at all times prior to its being sealed and labeled. As provided below, the specimen shall be sealed (by placement of a tamperproof seal over the bottle cap and down the sides of the bottle) and labeled in the presence of the employee. If the specimen is transferred to a second bottle, the collection site person shall request the individual to observe the transfer of the specimen and the placement of the tamperproof seal over the bottle cap and down the sides of the bottle.
- (18) The collection site person and the individual being tested shall be present at the same time during procedures outlined in paragraphs (f)(19)-(f)(22) of this section.
- (19) The collection site person shall place securely on the bottle an identification label which contains the date, the individual's specimen number, and any other identifying information provided or required by the employer. If separate from the label, the tamperproof seal shall also be applied.
- (20) The individual shall initial the identification label on the specimen bottle for the purpose of certifying that it is the specimen collected from him or her.
- (21) The collection site person shall enter on the drug testing custody and control form all information identifying the specimen. The collection site person shall sign the drug testing custody and control form certifying that the collection was accomplished according to the applicable Federal requirements.
- (22)
 - (i) The individual shall be asked to read and sign a statement on the drug testing custody and control form certifying that the specimen identified as having been collected from him or her is in fact the specimen he or she provided.
 - (ii) When specified by DOT agency regulation or required by the collection site (other than an employer site) or by the laboratory, the employee may be required to sign a consent or release form authorizing the collection of the specimen, analysis of the specimen for designated controlled substances, and release of the results to the employer. The employee may not be required to waive liability with respect to negligence on the part of any person participating in the

collection, handling or analysis of the specimen or to indemnify any person for the negligence of others.

- (23) The collection site person shall complete the chain of custody portion of the drug testing custody and control form to indicate receipt of the specimen from the employee and shall certify proper completion of the collection.
- (24) The urine specimen and chain of custody form are now ready for shipment. If the specimen is not immediately prepared for shipment, the collection site person shall ensure that it is appropriately safeguarded during temporary storage.
- (25)
 - (i) While any part of the above chain of custody procedures is being performed, it is essential that the urine specimen and custody documents be under the control of the involved collection site person. If the involved collection site person leaves his or her work station momentarily, the collection site person shall take the specimen and drug testing custody and control form with him or her or shall secure them. After the collection site person returns to the work station, the custody process will continue. If the collection site person is leaving for an extended period of time, he or she shall package the specimen for mailing before leaving the site.
 - (ii) The collection site person shall not leave the collection site in the interval between presentation of the specimen by the employee and securement of the sample with an identifying label bearing the employee's specimen identification number (shown on the urine custody and control form) and seal initialed by the employee. If it becomes necessary for the collection site person to leave the site during this interval, the collection shall be nullified and (at the election of the employer) a new collection begun.
- (g) *Collection control.* To the maximum extent possible, collection site personnel shall keep the individual's specimen bottle within sight both before and after the individual has urinated. After the specimen is collected, it shall be properly sealed and labeled.
- (h) *Transportation to laboratory.* Collection site personnel shall arrange to ship the collected specimen to the drug testing laboratory. The specimens shall be placed in shipping containers designed to minimize the possibility of damage during shipment (e.g., specimen boxes and/or padded mailers); and those containers shall be securely sealed to eliminate the possibility of undetected tampering. On the tape sealing the container, the collection site person shall sign and enter the date specimens were sealed in the shipping containers for shipment. The collection site person shall ensure that the chain of custody documentation is attached or enclosed in each container sealed for shipment to the drug testing laboratory.
- (i) *Failure to cooperate.* If the employee refuses to cooperate with the collection process, the collection site person shall inform the employer representative and shall document the non-cooperation on the drug testing custody and control form.

- (j) *Employee requiring medical attention.* If the sample is being collected from an employee in need of medical attention (e.g., as part of a post-accident test given in an emergency medical facility), necessary medical attention shall not be delayed in order to collect the specimen.
- (k) *Use of chain of custody forms.* A chain of custody form (and a laboratory internal chain of custody document, where applicable) shall be used for maintaining control and accountability of each specimen from the point of collection to final disposition of the specimen. The date and purpose shall be documented on the form each time a specimen is handled or transferred and every individual in the chain shall be identified. Every effort shall be made to minimize the number of persons handling specimens.

§ 40.27 Laboratory personnel

(a) *Day-to-day management.*

- (1) The laboratory shall have a qualified individual to assume professional, organizational, educational, and administrative responsibility for the laboratory's urine drug testing facility.
- (2) This individual shall have documented scientific qualifications in analytical forensic toxicology. Minimum qualifications are:
 - (i) Certification as a laboratory director by a State in forensic or clinical laboratory toxicology; or
 - (ii) A Ph.D. in one of the natural sciences with an adequate undergraduate and graduate education in biology, chemistry, and pharmacology or toxicology; or
 - (iii) Training and experience comparable to a Ph.D. in one of the natural sciences, such as a medical or scientific degree with additional training and laboratory/research experience in biology, chemistry, and pharmacology or toxicology; and
 - (iv) In addition to the requirements in paragraph (a)(2) (i), (ii), or (iii) of this section, minimum qualifications also require:
 - (A) Appropriate experience in analytical forensic toxicology including experience with the analysis of biological material for drugs of abuse, and
 - (B) Appropriate training and/or experience in forensic applications of analytical toxicology, e.g., publications, court testimony, research concerning analytical toxicology of drugs of abuse, or other factors which qualify the individual as an expert witness in forensic toxicology.

- (3) This individual shall be engaged in and responsible for the day-to-day management of the drug testing laboratory even where another individual has overall responsibility for an entire multi-specialty laboratory.
 - (4) This individual shall be responsible for ensuring that there are enough personnel with adequate training and experience to supervise and conduct the work of the drug testing laboratory. He or she shall assure the continued competency of laboratory personnel by documenting their in-service training, reviewing their work performance, and verifying their skills.
 - (5) This individual shall be responsible for the laboratory's having a procedure manual which is complete, up-to-date, available for personnel performing tests, and followed by those personnel. The procedure manual shall be reviewed, signed, and dated by this responsible individual whenever procedures are first placed into use or changed or when a new individual assumes responsibility for management of the drug testing laboratory. Copies of all procedures and dates on which they are in effect shall be maintained. (Specific contents of the procedure manual are described in § 40.29(n)(1).)
 - (6) This individual shall be responsible for maintaining a quality assurance program to assure the proper performance and reporting of all test results; for maintaining acceptable analytical performance for all controls and standards; for maintaining quality control testing; and for assuring and documenting the validity, reliability, accuracy, precision, and performance characteristics of each test and test system.
 - (7) This individual shall be responsible for taking all remedial actions necessary to maintain satisfactory operation and performance of the laboratory in response to quality control systems not being within performance specifications, errors in result reporting or in analysis of performance testing results. This individual shall ensure that sample results are not reported until all corrective actions have been taken and he or she can assure that the tests results provided are accurate and reliable.
- (b) *Test validation.* The laboratory's urine drug testing facility shall have a qualified individual(s) who reviews all pertinent data and quality control results in order to attest to the validity of the laboratory's test reports. A laboratory may designate more than one person to perform this function. This individual(s) may be any employee who is qualified to be responsible for day-to-day management or operation of the drug testing laboratory.
- (c) *Day-to-day operations and supervision of analysts.* The laboratory's urine drug testing facility shall have an individual to be responsible for day-to-day operations and to supervise the technical analysts. This individual(s) shall have at least a bachelor's degree in the chemical or biological sciences or medical technology or equivalent. He or she shall have training and experience in the theory and practice of the procedures used in the laboratory, resulting in his or her thorough understanding of quality control practices and procedures; the review, interpretation, and reporting of test results; main-

tenance of chain of custody; and proper remedial actions to be taken in response to test systems being out of control limits or detecting aberrant test or quality control results.

- (d) *Other personnel.* Other technicians or nontechnical staff shall have the necessary training and skills for the tasks assigned.
- (e) *Training.* The laboratory's urine drug testing program shall make available continuing education programs to meet the needs of laboratory personnel.
- (f) *Files.* Laboratory personnel files shall include: resume of training and experience, certification or license if any; references; job descriptions; records of performance evaluation and advancement; incident reports; and results of tests which establish employee competency for the position he or she holds, such as a test for color blindness, if appropriate.

§ 40.29 Laboratory analysis procedures

- (a) *Security and chain of custody.*
 - (1) Drug testing laboratories shall be secure at all times. They shall have in place sufficient security measures to control access to the premises and to ensure that no unauthorized personnel handle specimens or gain access to the laboratory process or to areas where records are stored. Access to these secured areas shall be limited to specifically authorized individuals whose authorization is documented. With the exception of personnel authorized to conduct inspections on behalf of Federal agencies for which the laboratory is engaged in urine testing or on behalf of DHHS, all authorized visitors and maintenance and service personnel shall be escorted at all times. Documentation of individuals accessing these areas, dates, and time of entry and purpose of entry must be maintained.
 - (2) Laboratories shall use chain of custody procedures to maintain control and accountability of specimens from receipt through completion of testing, reporting of results during storage, and continuing until final disposition of specimens. The date and purpose shall be documented on an appropriate chain of custody form each time a specimen is handled or transferred and every individual in the chain shall be identified. Accordingly, authorized technicians shall be responsible for each urine specimen or aliquot in their possession and shall sign and complete chain of custody forms for those specimens or aliquots as they are received.
- (b) *Receiving.*
 - (1) When a shipment of specimens is received, laboratory personnel shall inspect each package for evidence of possible tampering and compare information on specimen bottles within each package to the information on the accompanying chain of custody forms. Any direct evidence of tampering or discrepancies in the information on specimen bottles and the employer's chain of custody forms attached to the shipment shall be immediately reported to the employer and

shall be noted on the laboratory's chain of custody form which shall accompany the specimens while they are in the laboratory's possession.

- (2) Specimen bottles generally shall be retained within the laboratory's accession area until all analyses have been completed. Aliquots and the laboratory's chain of custody forms shall be used by laboratory personnel for conducting initial and confirmatory tests.
- (c) *Short-term refrigerated storage.* Specimens that do not receive an initial test within 7 days of arrival at the laboratory shall be placed in secure refrigeration units. Temperatures shall not exceed 6°C. Emergency power equipment shall be available in case of prolonged power failure.
- (d) *Specimen processing.* Laboratory facilities for urine drug testing will normally process specimens by grouping them into batches. The number of specimens in each batch may vary significantly depending on the size of the laboratory and its workload. When conducting either initial or confirmatory tests, every batch shall contain an appropriate number of standards for calibrating the instrumentation and a minimum of 10 percent controls. Both quality control and blind performance test samples shall appear as ordinary samples to laboratory analysts.
- (e) *Initial test.*
 - (1) The initial test shall use an immunoassay which meets the requirements of the Food and Drug Administration for commercial distribution. The following initial cutoff levels shall be used when screening specimens to determine whether they are negative for these five drugs or classes of drugs:

**Initial test cutoff
levels (ng/ml)**

Marijuana metabolites	100
Cocaine metabolites	300
Opiate metabolites	300*
Phencyclidine	25
Amphetamines	1,000

*25 ng/ml if immunoassay specific for free morphine.

- (2) These cutoff levels are subject to change by the Department of Health and Human Services as advances in technology or other considerations warrant identification of these substances at other concentrations.
- (f) *Confirmatory test.*
 - (1) All specimens identified as positive on the initial test shall be confirmed using gas chromatography/mass spectrometry (GC/MS) techniques at the cutoff levels listed in this paragraph for each drug. All confirmations shall be by quantitative analysis. Concentrations that exceed the linear region of the standard curve shall be documented in the laboratory record as "greater than highest standard curve value."

**Initial test cutoff
levels (ng/ml)**

Marijuana metabolites ¹	15
Cocaine metabolite ²	150
Opiates:	
Morphine	300
Codeine	300
Phencyclidine	25
Amphetamines:	
Amphetamine	500
Methamphetamine	500

¹Delta-9-tetrahydrocannabinol-9-carboxylic acid.

²Benzoylcegonine.

- (2) These cutoff levels are subject to change by the Department of Health and Human Services as advances in technology or other considerations warrant identification of these substances at other concentrations.

(g) *Reporting results.*

- (1) The laboratory shall report test results to the employer's Medical Review Officer within an average of 5 working days after receipt of the specimen by the laboratory. Before any test result is reported (the results of initial tests, confirmatory tests, or quality control data), it shall be reviewed and the test certified as an accurate report by the responsible individual. The report shall identify the drugs/metabolites tested for, whether positive or negative, the specimen number assigned by the employer, and the drug testing laboratory specimen identification number (accession number).
- (2) The laboratory shall report as negative all specimens that are negative on the initial test or negative on the confirmatory test. Only specimens confirmed positive shall be reported positive for a specific drug.
- (3) The Medical Review Officer may request from the laboratory and the laboratory shall provide quantitation of test results. The MRO shall report whether the test is positive or negative, and may report the drug(s) for which there was a positive test, but shall not disclose the quantitation of test results to the employer. Provided, that the MRO may reveal the quantitation of a positive test result to the employer, the employee, or the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the employee and arising from a verified positive drug test.
- (4) The laboratory may transmit results to the Medical Review Officer by various electronic means (for example, teleprinters, facsimile, or computer) in a manner designed to ensure confidentiality of the information. Results may not be provided verbally by telephone. The laboratory and employer must ensure the security of the data transmission and limit access to any data transmission, storage, and retrieval system.

- (5) The laboratory shall send only to the Medical Review Officer the original or a certified true copy of the drug testing custody and control form (part 2), which, in the case of a report positive for drug use, shall be signed (after the required certification block) by the individual responsible for day-to-day management of the drug testing laboratory or the individual responsible for attesting to the validity of the test reports, and attached to which shall be a copy of the test report.
- (6) The laboratory shall provide to the employer official responsible for coordination of the drug testing program a monthly statistical summary of urinalysis testing of the employer's employees and shall not include in the summary any personal identifying information. Initial and confirmation data shall be included from test results reported within that month. Normally this summary shall be forwarded by registered or certified mail not more than 14 calendar days after the end of the month covered by the summary. The summary shall contain the following information:
- (i) Initial Testing;
- (A) Number of specimens received;
 - (B) Number of specimens reported out; and
 - (C) Number of specimens screened positive for:
 - Marijuana metabolites
 - Cocaine metabolites
 - Opiate metabolites
 - Phencyclidine
 - Amphetamine
- (ii) Confirmatory Testing:
- (A) Number of specimens received for confirmation;
 - (B) Number of specimens confirmed positive for:
 - Marijuana metabolite
 - Cocaine metabolite
 - Morphine, codeine
 - Phencyclidine
 - Amphetamine
 - Methamphetamine

Monthly reports shall not include data from which it is reasonably likely that information about individuals' tests can be readily inferred. If necessary, in order to prevent the disclosure of such data, the laboratory shall not send a report until data are sufficiently aggregated to make such an inference unlikely. In any month in which a report is withheld for this reason, the laboratory will so inform the employer in writing.

- (7) The laboratory shall make available copies of all analytical results for employer drug testing programs when requested by DOT or any DOT agency with regulatory authority over the employer.
- (8) Unless otherwise instructed by the employer in writing, all records pertaining to a given urine specimen shall be retained by the drug testing laboratory for a minimum of 2 years.
- (h) *Long-term storage.* Long-term frozen storage (-20°C or less) ensures that positive urine specimens will be available for any necessary retest during administrative or disciplinary proceedings. Drug testing laboratories shall retain and place in properly secured long-term frozen storage for a minimum of 1 year all specimens confirmed positive, in their original labeled specimen bottles. Within this 1-year period, an employer (or other person designated in a DOT agency regulation) may request the laboratory to retain the specimen for an additional period of time, but if no such request is received the laboratory may discard the specimen after the end of 1 year, except that the laboratory shall be required to maintain any specimens known to be under legal challenge for an indefinite period.
- (i) *Retesting specimens.* Because some analytes deteriorate or are lost during freezing and/or storage, quantitation for a retest is not subject to a specific cutoff requirement but must provide data sufficient to confirm the presence of the drug or metabolite.
- (j) *Subcontracting.* Drug testing laboratories shall not subcontract and shall perform all work with their own personnel and equipment. The laboratory must be capable of performing testing for the five classes of drugs (marijuana, cocaine, opiates, phencyclidine and amphetamines) using the initial immunoassay and confirmatory GC/MS methods specified in this part. This paragraph does not prohibit subcontracting of laboratory analysis if specimens are sent directly from the collection site to the subcontractor, the subcontractor is a laboratory certified by DHHS as required in this part, the subcontractor performs all analysis and provides storage required under this part, and the subcontractor is responsible to the employer for compliance with this part and applicable DOT agency regulations as if it were the prime contractor.
- (k) *Laboratory facilities.*
 - (1) Laboratory facilities shall comply with applicable provisions of any State licensing requirements.
 - (2) Laboratories certified in accordance with DHHS Guidelines shall have the capability, at the same laboratory premises, of performing initial and confirmatory tests for each drug or metabolite for which service is offered.
- (l) *Inspections.* The Secretary, a DOT agency, any employer utilizing the laboratory, DHHS or any organization performing laboratory certification on behalf of DHHS reserves the right to inspect the laboratory at any time. Employer contracts with laboratories for drug testing, as well as contracts for collection site services, shall permit the employer and the DOT agency of jurisdiction (directly or through an agent) to conduct unannounced inspections.

(m) *Documentation.* The drug testing laboratories shall maintain and make available for at least 2 years documentation of all aspects of the testing process. This 2 year period may be extended upon written notification by a DOT agency or by any employer for which laboratory services are being provided. The required documentation shall include personnel files on all individuals authorized to have access to specimens; chain of custody documents; quality assurance/quality control records; procedure manuals; all test data (including calibration curves and any calculations used in determining test results); reports; performance records on performance testing; performance on certification inspections; and hard copies of computer-generated data. The laboratory shall maintain documents for any specimen known to be under legal challenge for an indefinite period.

(n) *Additional requirements for certified laboratories.*

- (1) *Procedure manual.* Each laboratory shall have a procedure manual which includes the principles of each test preparation of reagents, standards and controls, calibration procedures, derivation of results, linearity of methods, sensitivity of methods, cutoff values, mechanisms for reporting results, controls criteria for unacceptable specimens and results, remedial actions to be taken when the test systems are outside of acceptable limits, reagents and expiration dates, and references. Copies of all procedures and dates on which they are in effect shall be maintained as part of the manual.
- (2) *Standards and controls.* Laboratory standards shall be prepared with pure drug standards which are properly labeled as to content and concentration. The standards shall be labeled with the following dates: when received; when prepared or opened; when placed in service; and expiration date.
- (3) *Instruments and equipment.*
 - (i) Volumetric pipettes and measuring devices shall be certified for accuracy or be checked by gravimetric, colorimetric, or other verification procedure. Automatic pipettes and dilutors shall be checked for accuracy and reproducibility before being placed in service and checked periodically thereafter.
 - (ii) There shall be written procedures for instrument set-up and normal operation, a schedule for checking critical operating characteristics for all instruments, tolerance limits for acceptable function checks and instructions for major trouble shooting and repair. Records shall be available on preventive maintenance.
- (4) *Remedial actions.* There shall be written procedures for the actions to be taken when systems are out of acceptable limits or errors are detected. There shall be documentation that these procedures are followed and that all necessary corrective actions are taken. There shall also be in place systems to verify all stages of testing and reporting and documentation that these procedures are followed.
- (5) *Personnel available to testify at proceedings.* A laboratory shall have qualified personnel available to testify in an administrative or disciplinary proceeding

against an employee when that proceeding is based on positive urinalysis results reported by the laboratory.

§ 40.31 Quality assurance and quality control

- (a) *General.* Drug testing laboratories shall have a quality assurance program which encompasses all aspects of the testing process including but not limited to specimen acquisition, chain of custody security and reporting of results, initial and confirmatory testing and validation of analytical procedures. Quality assurance procedures shall be designed, implemented and reviewed to monitor the conduct of each step of the process of testing for drugs.
- (b) *Laboratory quality control requirements for initial tests.* Each analytical run of specimens to be screened shall include:
 - (1) Urine specimens certified to contain no drug;
 - (2) Urine specimens fortified with known standards; and
 - (3) Positive controls with the drug or metabolite at or near the cutoff level.

In addition, with each batch of samples a sufficient number of standards shall be included to ensure and document the linearity of the assay method over time in the concentration area of the cutoff. After acceptable values are obtained for the known standards, those values will be used to calculate sample data. Implementation of procedures to ensure the carryover does not contaminate the testing of an individual's specimen shall be documented. A minimum of 10 percent of all test samples shall be quality control specimens. Laboratory quality control samples, prepared from spiked urine samples of determined concentration shall be included in the run and should appear as normal samples to laboratory analysts. One percent of each run, with a minimum of at least one sample, shall be the laboratory's own quality control samples.

- (c) *Laboratory quality control requirements for confirmation tests.* Each analytical run of specimens to be confirmed shall include:
 - (1) Urine specimens certified to contain no drug;
 - (2) Urine specimens fortified with known standards; and
 - (3) Positive controls with the drug or metabolite at or near the cutoff level. The linearity and precision of the method shall be periodically documented. Implementation of procedures to ensure that carryover does not contaminate the testing of an individual's specimen shall also be documented.
- (d) *Employer blind performance test procedures.*
 - (1) Each employer covered by DOT agency drug testing regulations shall use blind testing quality control procedures as provided in this paragraph.

- (2) Each employer shall submit three blind performance test specimens for each 100 employee specimens it submits, up to a maximum of 100 blind performance test specimens submitted per quarter. A DOT agency may increase this per quarter maximum number of samples if doing so is necessary to ensure adequate quality control of employers or consortiums with very large numbers of employees.
- (3) For employers with 2000 or more covered employees, approximately 80 percent of the blind performance test samples shall be blank (i.e., containing no drug or otherwise as approved by a DOT agency) and the remaining samples shall be positive for one or more drugs per sample in a distribution such that all the drugs to be tested are included in approximately equal frequencies of challenge. The positive samples shall be spiked only with those drugs for which the employer is testing. This paragraph shall not be construed to prohibit spiking of other (potentially interfering) compounds, as technically appropriate, in order to verify the specificity of a particular assay.
- (4) Employers with fewer than 2000 covered employees may submit blind performance test specimens as provided in paragraph (d)(3) of this section. Such employers may also submit only blank samples or may submit two separately labeled portions of a specimen from the same non-covered employee.
- (5) Consortiums shall be responsible for the submission of blind samples on behalf of their members. The blind sampling rate shall apply to the total number of samples submitted by the consortium.
- (6) The DOT agency concerned shall investigate, or shall refer to DHHS for investigation, any unsatisfactory performance testing result and, based on this investigation, the laboratory shall take action to correct the cause of the unsatisfactory performance test result. A record shall be made of the investigative findings and the corrective action taken by the laboratory, and that record shall be dated and signed by the individual responsible for the day-to-day management and operation of the drug testing laboratory. Then the DOT agency shall send the document to the employer as a report of the unsatisfactory performance testing incident. The DOT agency shall ensure notification of the finding to DHHS.
- (7) Should a false positive error occur on a blind performance test specimen and the error is determined to be an administrative error (clerical, sample mixup, etc.), the employer shall promptly notify the DOT agency concerned. The DOT agency and the employer shall require the laboratory to take corrective action to minimize the occurrence of the particular error in the future, and, if there is reason to believe the error could have been systemic, the DOT agency may also require review and reanalysis of previously run specimens.
- (8) Should a false positive error occur on a blind performance test specimen and the error is determined to be a technical or methodological error, the employer shall instruct the laboratory to submit all quality control data from the batch of specimens which included the false positive specimen to the DOT agency concerned. In addition, the laboratory shall retest all specimens analyzed positive for that drug or metabolite from the time of final resolution of the error back to

the time of the last satisfactory performance test cycle. This retesting shall be documented by a statement signed by the individual responsible for day-to-day management of the laboratory's urine drug testing. The DOT agency concerned may require an on-site review of the laboratory which may be conducted unannounced during any hours of operation of the laboratory. Based on information provided by the DOT agency, DHHS has the option of revoking or suspending the laboratory's certification or recommending that no further action be taken if the case is one of less serious error in which corrective action has already been taken, thus reasonably assuring that the error will not occur again.

§ 40.33 Reporting and review of results

(a) *Medical review officer shall review confirmed positive results.*

- (1) An essential part of the drug testing program is the final review of confirmed positive results from the laboratory. A positive test result does not automatically identify an employee/applicant as having used drugs in violation of a DOT agency regulation. An individual with a detailed knowledge of possible alternate medical explanations is essential to the review of results. This review shall be performed by the Medical Review Officer (MRO) prior to the transmission of the results to employer administrative officials. The MRO review shall include review of the chain of custody to ensure that it is complete and sufficient on its face.
- (2) The duties of the MRO with respect to negative results are purely administrative.

(b) *Medical review officer-qualifications and responsibilities.*

- (1) The MRO shall be a licensed physician with knowledge of substance abuse disorders and may be an employee of a transportation employer or a private physician retained for this purpose.
- (2) The MRO shall not be an employee of the laboratory conducting the drug test unless the laboratory establishes a clear separation of functions to prevent any appearance of a conflict of interest, including assuring that the MRO has no responsibility for, and is not supervised by or the supervisor of, any persons who have responsibility for the drug testing or quality control operations of the laboratory.
- (3) The role of the MRO is to review and interpret confirmed positive test results obtained through the employer's testing program. In carrying out this responsibility, the MRO shall examine alternate medical explanations for any positive test result. This action may include conducting a medical interview and review of the individual's medical history, or review of any other relevant biomedical factors. The MRO shall review all medical records made available by the tested individual when a confirmed positive test could have resulted from legally prescribed medication. The MRO shall not, however, consider the results or urine samples that are not obtained or processed in accordance with this part.

(c) *Positive test result.*

- (1) Prior to making a final decision to verify a positive test result for an individual, the MRO shall give the individual an opportunity to discuss the test result with him or her.
- (2) The MRO shall contact the individual directly, on a confidential basis, to determine whether the employee wishes to discuss the test result. A staff person under the MRO's supervision may make the initial contact, and a medically licensed or certified staff person may gather information from the employee. Except as provided in paragraph (c)(5) of this section, the MRO shall talk directly with the employee before verifying a test as positive.
- (3) If, after making all reasonable efforts and documenting them, the MRO is unable to reach the individual directly, the MRO shall contact a designated management official who shall direct the individual to contact the MRO as soon as possible. If it becomes necessary to reach the individual through the designated management official, the designated management official shall employ procedures that ensure, to the maximum extent practicable, the requirement that the employee contact the MRO is held in confidence.
- (4) If, after making all reasonable efforts, the designated management official is unable to contact the employee, the employer may place the employee on temporary medically unqualified status or medical leave.
- (5) The MRO may verify a test as positive without having communicated directly with the employee about the test in three circumstances:
 - (i) The employee expressly declines the opportunity to discuss the test;
 - (ii) The designated employer representative has successfully made and documented a contact with the employee and instructed the employee to contact the MRO (see paragraphs (c) (3) and (4) of this section), and more than five days have passed since the date the employee was successfully contacted by the designated employer representative; or
 - (iii) Other circumstances provided for in DOT agency drug testing regulations.
- (6) If a test is verified positive under the circumstances specified in paragraph (c)(5)(ii) of this section, the employee may present to the MRO information documenting that serious illness, injury, or other circumstances unavoidably prevented the employee from timely contacting the MRO. The MRO, on the basis of such information, may reopen the verification, allowing the employee to present information concerning a legitimate explanation for the confirmed positive test. If the MRO concludes that there is a legitimate explanation, the MRO declares the test to be negative.

- (7) Following verification of a positive test result, the MRO shall, as provided in the employer's policy, refer the case to the employer's employee assistance or rehabilitation program, if applicable, to the management official empowered to recommend or take administrative action (or the official's designated agent), or both.
- (d) *Verification for opiates; review for prescription medication.* Before the MRO verifies a confirmed positive result for opiates, he or she shall determine that there is clinical evidence—in addition to the urine test—of unauthorized use of any opium, opiate, or opium derivative (e.g., morphine/codeine). (This requirement does not apply if the employer's GC/MS confirmation testing for opiates confirms the presence of 6-monoacetylmorphine.)
- (e) Reanalysis authorized. Should any question arise as to the accuracy or validity of a positive test result, only the Medical Review Officer is authorized to order a reanalysis of the original sample and such retests are authorized only at laboratories certified by DHHS. The Medical Review Officer shall authorize a reanalysis of the original sample if requested to do so by the employee within 72 hours of the employee's having received actual notice of the positive test. If the retest is negative, the MRO shall cancel the test.
- (f) *Result consistent with legal drug use.* If the MRO determines there is a legitimate medical explanation for the positive test result, the MRO shall report the test result to the employer as negative.
- (g) *Result scientifically insufficient.* Additionally, the MRO, based on review of inspection reports, quality control data, multiple samples, and other pertinent results, may determine that the result is scientifically insufficient for further action and declare the test specimen negative. In this situation the MRO may request reanalysis of the original sample before making this decision. (The MRO may request that reanalysis as provided in § 40.33(e) be performed by the same laboratory or, that an aliquot of the original specimen be sent for reanalysis to an alternate laboratory which is certified in accordance with the DHHS Guidelines.) The laboratory shall assist in this review process as requested by the MRO by making available the individual responsible for day-to-day management of the urine drug testing laboratory or other employee who is a forensic toxicologist or who has equivalent forensic experience in urine drug testing, to provide specific consultation as required by the employer. The employer shall include in any required annual report to a DOT agency a summary of any negative findings based on scientific insufficiency but shall not include any personal identifying information in such reports.
- (h) *Disclosure of information.* Except as provided in this paragraph, the MRO shall not disclose to any third party medical information provided by the individual to the MRO as a part of the testing verification process.
- (1) The MRO may disclose such information to the employer, a DOT agency or other Federal safety agency, or a physician responsible for determining the

medical qualification of the employee under an applicable DOT agency regulation, as applicable, only if—

- (i) An applicable DOT regulation permits or requires such disclosure;
 - (ii) In the MRO's reasonable medical judgment, the information could result in the employee being determined to be medically unqualified under an applicable DOT agency rule; or
 - (iii) In the MRO's reasonable medical judgment, in a situation in which there is no DOT agency rule establishing physical qualification standards applicable to the employee, the information indicates that continued performance by the employee of his or her safety-sensitive function could pose a significant safety risk.
- (2) Before obtaining medical information from the employee as part of the verification process, the MRO shall inform the employee that information may be disclosed to third parties as provided in this paragraph and the identity of any parties to whom information may be disclosed.

§ 40.35 Protection of employee records

Employer contracts with laboratories shall require that the laboratory maintain employee test records in confidence, as provided in DOT agency regulations. The contracts shall provide that the laboratory shall disclose information related to a positive drug test of an individual to the individual, the employer, or the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual and arising from a certified positive drug test.

§ 40.37 Individual access to test and laboratory certification results

Any employee who is the subject of a drug test conducted under this part shall, upon written request, have access to any records relating to his or her drug test and any records relating to the results of any relevant certification, review, or revocation-of-certification proceedings.

§ 40.39 Use of DHHS-certified laboratories

Employers subject to this part shall use only laboratories certified under the DHHS "Mandatory Guidelines for Federal Workplace Drug Testing Programs," 53 FR 11970, April 11, 1988, and subsequent amendments thereto.

49 CFR Part 653

Issued: January 25, 1994.

Federico Peña,
Secretary of Transportation.
Gordon J. Linton,
Administrator.

[FR Doc. 94-2039 Filed 2-3-94; 1:00 pm]

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DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Part 653

[Docket No. 92-H]

RIN 2132-AA37

Prevention of Prohibited Drug Use in Transit Operations

AGENCY: Federal Transit Administration, DOT.

ACTION: Final rule.

SUMMARY: The Omnibus Transportation Employee Testing Act of 1991 directs the Federal Transit Administration to issue regulations on drug and alcohol testing for mass transit workers in safety-sensitive positions. This document accordingly sets forth the agency's anti-drug program, which is intended to increase the safety of mass transit operations.

EFFECTIVE DATE: March 17, 1994.

FOR FURTHER INFORMATION CONTACT: For program issues, Judy Meade, Office of Safety and Security, Federal Transit Administration, DOT, 400 Seventh St., SW., room 6432, Washington DC 20590. Telephone: 202-366-2896. For legal questions, Nancy Zaczek or Daniel Duff, Office of the Chief Counsel, Federal Transit Administration, DOT, 400 Seventh St., SW., room 9316, Washington DC 20590. Telephone: 202-366-4011 (voice); 202-366-2979 (TDD). Copies of the regulation are available in alternative formats upon request.

SUPPLEMENTARY INFORMATION: Because of the length of this preamble, the following outline of the rule's introductory material is provided.

I. Discussion

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I. Discussion

A. Background

On December 15, 1992, the Federal Transit Administration (FTA) published a Notice of Proposed Rulemaking (NPRM) in the *Federal Register*, at 57 FR 59660, entitled "Prevention of Prohibited Drug Use in Transit Operations." The NPRM invited comment from the public on the proposed rule, which would require certain recipients of Federal transit funding to have a comprehensive anti-drug program. FTA provided a 120-day comment period and received over 80 comments on the regulation proposed in the NPRM.

In addition to receiving written comments on the NPRM, in 1993 FTA held three public hearings on the rule: on February 25-26, in Washington DC, on March 1-2, in Chicago, Illinois, and on March 4-5, in San Francisco, California. Each hearing was recorded by a court reporter; the transcript of each hearing and any statements or other material submitted to the hearing officer during the hearings are contained in the public docket to this rule and were considered in developing this final rule.

B. The 1988 Drug Rule

On November 22, 1988, the FTA issued a final rule requiring certain recipients of Federal financial assistance under the Urban Mass Transportation Act of 1964, as amended, to develop and implement drug testing programs. That regulation, codified at 49 CFR part 653, was the first time the FTA had required such a program. By December 21, 1989, approximately 200 large transit systems certified compliance with the regulation and began testing the urine of safety-sensitive employees for five types of illegal drugs.

Shortly after its final rule was published in 1988, the FTA was sued by three unions representing most American transit workers. In these three suits, consolidated in the United States District Court for the District of Columbia, the plaintiffs contended,

among other arguments, that FTA lacked statutory authority to issue a drug testing rule. The district court upheld the regulation and the plaintiffs appealed.

On January 19, 1990, the United States Court of Appeals for the District of Columbia Circuit overturned that decision in *Amalgamated Transit Union v. Skinner*, 894 F.2d 1362 (D.C. Cir. 1990) and on January 25, 1990, FTA published a notice in the *Federal Register* suspending its anti-drug regulation. (Today's final rule replaces suspended part 653 with a new part 653.)

Subsequently, the Omnibus Transportation Employee Testing Act of 1991 (the Act) was enacted, authorizing FTA to require drug testing of safety-sensitive employees. (Pub. L. 102-143, Title V.) This final rulemaking is issued under the authority of that Act.

C. The Omnibus Transportation Employee Testing Act of 1991

The Act requires the FTA to issue a rule requiring recipients of certain FTA funding to test safety-sensitive employees for the prohibited use of controlled substances. The Act directs FTA to require recipients of Federal funds under section 3, 9, or 18 of the Federal Transit Act, as amended (FT Act), or section 103(e)(4) of title 23 of the U.S. Code, to test safety-sensitive employees for any substance listed in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)) which the Secretary has determined poses a risk to transportation safety. Because certain recipients of FTA funds are regulated by the Federal Railroad Administration (FRA) or the Federal Highway Administration (FHWA), the Act permits such recipients to be subject to the anti-drug regulations of those agencies.

Compliance with FTA's rule is a condition of the receipt of certain kinds of Federal transit funding. The Act authorizes FTA to withhold that funding if a recipient is not in compliance with FTA's rule or, as appropriate, the anti-drug rules of FRA or FHWA. Specifically, the Act authorizes FTA to withhold Federal funding under section 3, 9, or 18 of the FT Act or section 103(e)(4) of title 23 of the U.S. Code.

The Act directs the FTA to require four kinds of drug testing: pre-employment, reasonable suspicion, random, and post accident, and permits FTA to require periodic drug testing. The Act further directs FTA to require a post-accident test when there has been a loss of human life.

The Act authorizes the testing only of employees who perform safety-sensitive functions, but does not define what activities constitute a safety-sensitive function, specifically authorizing the agency to make that determination.

The Act directs FTA to require its recipients to test safety-sensitive employees for the prohibited use of controlled substances, and in so doing to safeguard the privacy of safety-sensitive employees to the maximum extent practicable. Moreover, the Act requires that the specimen be subdivided, secured, and labeled in the presence of the tested employee, with one part tested and the other part retained in a secure manner to prevent tampering. If the tested portion is verified positive for the presence of illegal drugs, the Act specifies that the tested employee may request that the other portion be tested at another certified laboratory. To ensure the accuracy of the testing procedures, the Act permits only those laboratories certified by the Department of Health and Human Services (DHHS) to test specimen samples.

If a safety-sensitive employee has a verified positive drug test result for prohibited drugs, the Act directs FTA to ensure that the employee receives opportunity for evaluation and treatment. Also, the Act permits FTA, as appropriate, to permit the disqualification or dismissal of any safety-sensitive employee who has a verified positive drug test result.

In providing this regulatory authority, the Act authorizes the FTA to preempt State or local laws, rules, regulations, ordinances, standards, or orders inconsistent with this rule, except for certain provisions of State criminal law which impose sanctions for reckless conduct leading to actual loss of life, injury, or property damage.

D. Summary of the Final Rule

The final rule applies to recipients of Federal funds under sections 3, 9, or 18 of the FT Act, or section 103(e)(4) of title 23 of the United States Code. It requires each such recipient to establish and implement an anti-drug program, consisting primarily of a testing program but with elements requiring training, educating, and evaluating safety-sensitive employees as well.

The regulation specifies that safety-sensitive employees may not use any of the five prohibited substances identified in the regulation: marijuana, cocaine, opiates, amphetamines, or phencyclidine.

The rule mandates the following kinds of testing:

1. Pre-employment (including transfer from a nonsafety-sensitive position to a safety-sensitive position within the organization);
2. Reasonable suspicion;
3. Random;
4. Post-accident; and
5. Return to duty/follow-up (periodic).

The rule requires the use of testing procedures found in part 40 of title 49 of the Code of Federal Regulations, the procedures used in the drug testing rules of all agencies of the Department of Transportation (DOT), which requires the testing of urine samples. Part 40 conforms to the DHHS "Scientific and Technical Guidelines for Drug Testing Programs" issued on April 11, 1988 and amended today to incorporate changes required by the Act. For a discussion of those changes, please see part 40, "Procedures for Transportation Workplace Drug and Alcohol Testing Programs", and its accompanying preamble published elsewhere in today's Federal Register. This part 653 includes procedures that require a substance abuse professional to evaluate a covered employee who has a verified positive drug test result as defined under this part. Consequently, both parts must be followed.

If a covered employee has a verified positive drug test result (as defined in this part 653), the employee must be removed from the safety-sensitive position, be told about educational and treatment programs available, and be evaluated by a substance abuse professional to determine whether the employee has a drug problem. The rule does not address who should pay for the employee's treatment, which is a local issue.

To return to her safety-sensitive position, the employee must properly complete any course of treatment prescribed by the substance abuse professional and take a drug test with a verified negative result.

The rule requires each recipient to adopt a policy statement describing its anti-drug program policies and procedures, including the consequences of drug use and a verified positive drug test result.

The rule applies to any entity that receives certain Federal funding from the FTA. Such an entity, called a recipient, must certify to the FTA that it will carry out the requirements of this part. Not all such recipients provide mass transit services directly, relying instead upon other public or private entities to provide such services in whole or in part. In these cases, the direct recipient of FTA funds remains legally responsible to the FTA for

assuring that any entity operating on its behalf is in compliance with the drug testing rule.

Compliance with the rule is a condition of Federal assistance. Failure of a recipient to comply with the rule—either in its own operations or in those of an entity operating on its behalf—will result in the suspension of all Federal transit funding to the recipient.

Because, as noted above, a recipient may not always directly carry out mass transit services, the rule uses "operator" or "employer" to describe those who actually may be providing transit service and therefore must comply with the drug testing program, but under the rule it is always the direct recipient of FTA funds that legally is responsible to FTA for complying with the rule.

E. Overview of the Comments

The FTA received 84 comments in response to the NPRM. FTA considered all comments filed in a timely manner as well as all statements and material presented at the public hearings on the rule. The breakdown among commenter categories is as follows:

Transit operators (public and private) .	35
Cities and counties	4
State DOTs	11
Labor unions	2
Trade associations	9
Individual citizen	1
Nonprofit organizations/special transit providers	12
State governments	2
Public Utility	1
Member of Congress	1
Private businesses	3
Others	4

Most of the comments addressed issues raised in the NPRM, but some commenters addressed additional issues, such as whether volunteer drivers should be subject to the rule, or the applicability of the regulation to providers of transportation paid with publicly subsidized vouchers or scrip (user-side subsidies). All of the major issues addressed by the commenters are discussed in Section II.

II. Discussion of the Comments

A. Multi-modal Jurisdiction

Because many FTA recipients operate a variety of different mass transit services—such as bus, rapid rail, commuter rail, or ferry boat services—they may be regulated by the FTA and by another DOT agency or agencies, such as the Federal Railroad Administration (FRA), the Federal Highway Administration (FHWA), or the United States Coast Guard (Coast Guard). For the most part, these agencies have regulated drug use among safety-sensitive employees since 1989,

including employees of certain FTA recipients. In addition, the Act authorized FHWA, for the first time, to regulate intrastate Commercial Driver's License (CDL) holders, which include many transit employees. To limit the anti-drug regulations with which such recipients would have to comply, the NPRM discussed a proposal under which (1) FTA's drug testing regulation would apply to FTA recipients that operate railroads, including the recipient's safety-sensitive employees; (2) FTA's drug testing program, not FHWA's, would apply to recipients who employ or use the services of safety-sensitive employees who hold a CDL, but the individual CDL holder otherwise would remain subject to FHWA's implementation of the Commercial Motor Vehicle Safety Act of 1986; and (3) both FTA's and Coast Guard's drug testing program would apply to recipients operating vessels, and Coast Guard would continue to regulate the individual safety-sensitive employee (vessel crew member) by pursuing licensing actions or other punitive measures.

FTA received ten comments concerning the multi-modal jurisdictional issue suggesting a rather significant change to the FTA's approach to this rulemaking. Several commenters suggested that DOT should issue one regulation covering all entities regulated by any DOT agency. In contrast, other commenters suggested that FTA and FHWA should issue a joint regulation or issue two separate regulations using identical language. Lastly, one commenter particularly focused on the chain-of-custody form, mandated by part 40, and recommended that all DOT agencies use the same form.

FTA Response. FTA is sympathetic to the concerns of recipients regulated by more than one DOT agency anti-drug rule, some of whom proposed a single regulation. As a practical matter, however, an agency-wide DOT drug rule would be difficult to implement because of the different characteristics of the various communities each agency regulates. Nevertheless, FTA addresses the multi-jurisdictional issue by clarifying the jurisdiction of FTA, FRA, FHWA, and Coast Guard over transit entities. In this regard, we have adopted the proposal in the NPRM discussed above.

In response to one commenter, DOT will amend part 40 in the near future to address the issue concerning one DOT-wide chain-of-custody form.

B. Accident

The vast majority of comments concerning this definition focused on incidents involving only property damage; specifically, how the seriousness of these incidents should be measured, thus justifying the administration of a drug test. In the NPRM we had proposed a dollar measurement, whereby an accident was any incident resulting in at least \$1,000 in total property damage.

Most commenters addressed the dollar amount proposed in the NPRM and stated that \$1,000 was too low a threshold. Some of these commenters proposed their own method of calculating a dollar threshold such as a measurement based on a vehicle's gross vehicle weight—the greater the weight the higher the property damage threshold.

Other commenters objected to the use of a dollar threshold to measure the seriousness of incidents involving only damage to property. These commenters urged us to adopt an objective measure of property damage such as FHWA's definition of accident. FHWA defines an accident involving only property damage as an incident that so disables the vehicle that it must be towed away from the scene.

Another commenter objected to the use of dollar amounts and requested that we adopt a reasonable cause standard.

Other commenters addressed the overall definition of accident. In the NPRM we had limited the definition to an incident involving a revenue service vehicle, and several commenters objected to this limitation, proposing instead that we include any incident involving a nonrevenue service vehicle as well.

FTA Response. FTA has changed the definition of "accident" in such a way that it is broadened in some respects, and narrowed in others. In particular, FTA has broadened the definition in the final rule to include occurrences involving nonrevenue service vehicles operated by a holder of a CDL. We recognize that this decision falls short of the recommendation proposed by some commenters favoring the inclusion of all occurrences involving nonrevenue service vehicles, but it is based on another consideration, avoiding a jurisdictional conflict between FTA and FHWA. Ordinarily, FHWA would regulate CDL holders as well as their employers. This new coverage in our final rule is consistent with the agreement between FTA and FHWA that FTA's drug testing program applies to the transit employers of CDL holders.

FTA has further modified the proposed definition of "accident" to distinguish the situations of different kinds of mass transit vehicles. Many mass transit vehicles, such as buses and vans, are passenger-carrying motor vehicles. FTA believes that it is sensible to use a definition of "accident" that is consistent with FHWA's for such vehicles. Therefore, we are adopting a provision paralleling FHWA's definition of "accident" (in 49 CFR 390.5). The definition states that an accident occurs when a vehicle (whether a mass transit vehicle or another vehicle, such as a private automobile) suffers disabling damage and is towed away from the scene of the accident. This provision eliminates the subjectivity inherent in basing a definition on estimates of property damage.

For other vehicles—light or rapid rail cars, ferry boats, trolley cars and buses, etc.—we also believe it is best to eliminate a property damage-based standard. Instead, the final rule provides that if the mass transit vehicle is removed from revenue service as the result of the occurrence, an "accident" is deemed to take place. FTA believes that the operating practices of recipients typically result in at least the temporary removal from revenue service of vehicles that have been involved in all but the most minor of mishaps.

Of course, any occurrence in which someone is killed or injured sufficiently to require medical treatment away from the accident scene, is an "accident" for purposes of this rule, regardless of the type of transit vehicle involved.

We have further narrowed the definition of "accident" by deleting the reference to reportable accidents. In the NPRM we proposed that any occurrence required to be reported to FRA, FHWA, or the Coast Guard would constitute an accident, but the final rule uses only the criteria discussed above.

C. Safety-sensitive function

Most commenters addressed the definition of safety-sensitive function, one of the most important definitions in the rule. Because the proposed definition had a list of functional categories, most commenters objected either to the inclusion or exclusion of a particular category. Some commenters, however, merely sought clarification of the categories in the NPRM.

Including those employees who "maintain a revenue service vehicle" in the definition particularly concerned several commenters. While most commenters understood that this category included mechanics, some thought that it covered workers who clean rather than repair buses, rail cars,

and other mass transit facilities. The remaining commenters made specific recommendations concerning mechanics, some arguing that we should exclude all mechanics, with others stating that we should exclude only those working under contract for section 18 rural operators. Yet others suggested that we should include only those mechanics working for large transit operators.

Commenters objected to only one other safety-sensitive category, "controlling the movement of revenue service vehicles", the category which includes dispatchers. These commenters contend that dispatchers do not perform a safety-sensitive function.

Although we did not include any categories involving the construction, design, or manufacture of revenue service vehicles or other mass transit equipment or facilities, several commenters suggested that we specifically exclude them from the definition. Without this specific exclusion they believe there may be some instances in which such workers might be considered to be performing a safety-sensitive function.

Other commenters recommended that we add categories to the definition, including police and other security personnel, and mechanics who repair nonrevenue service vehicles.

Finally, some commenters sought clarification of the definition: whether it included volunteers and CDL holders, and on the meaning of "directly supervising an employee who is performing a safety-sensitive function."

FTA Response. We have made several changes to the definition of "safety-sensitive employee." Before describing those changes, however, we first explain why we proposed a definition based on function rather than titles. Because each transit system uses its own job classification categories, we wanted to avoid specifying particular job titles. Instead, we concluded that four job functions were critical to safety, and in the NPRM identified operating, maintaining, and controlling the movement of vehicles as those functions critical to the safety of the traveling public, and added a fourth category, first-line supervisors of anyone operating, maintaining, or controlling the movement of the vehicle. The final rule adopts these categories, with some changes.

Now a discussion of the changes made. Most notably, we have created two new categories of safety-sensitive functions: The carrying of a firearm for security purposes, and the operation of a nonrevenue service vehicle by a CDL holder. We include firearm-bearing

police and security personnel because of the sensitivity of their position and the danger to the public should they be under the influence of prohibited drugs.

As discussed above, FHWA regulates CDL holders, both interstate and intrastate, and their employers. FTA's relationship is with its recipients, many of whom employ CDL holders. To avoid a jurisdictional conflict, FTA and FHWA have agreed that FTA's drug testing rule will apply to transit entities that employ or use the services of CDL holders, regardless of the kind of vehicle they operate.

We have also reduced the scope of the definition somewhat. While we proposed in the NPRM to include supervisors of safety-sensitive employees, the final rule limits that category by covering only first-line supervisors whose responsibilities include the performance of a safety-sensitive function. For instance, if a supervisor's job description requires her to drive a vehicle, she would be covered, but if it did not, she would not.

Further, in response to comments, we have excluded from the scope of the rule contract mechanics for any entity receiving section 18 funds.

Regarding the recommendation specifically to exclude construction, design, and manufacturing personnel, we believe it is unnecessary to do so because the list of categories in the definition is exclusive. Any functional category—such as construction or design or manufacturing—not in the definition is not subject to the rule.

Finally, some clarification on the issue of safety-sensitive employees. Volunteers are covered by the rule if they perform any safety-sensitive function. Coverage under the rule should not be based on whether an individual holds a paying position, but on whether that individual is in a position to affect the safety of the transit-riding public. The final rule definition of covered employee thus specifically includes volunteers.

Another ambiguity mentioned by several commenters concerns the maintenance category, which several commenters believed would include workers who clean rather than repair transit equipment. We do not mean to cover such workers and emphasize that only mechanics who repair vehicles or who perform routine maintenance are the types of maintenance workers covered by the rule.

D. Covered employee/contractor

In the NPRM the definition of covered employee included three general categories of safety-sensitive employees—those directly employed by

an employer, those employed by a contractor, and applicants for a safety-sensitive position. Most comments about this definition pertained to the coverage of contractors in the NPRM, which included any person or organization providing services or performing work consistent with a specific understanding or arrangement, which could be a written contract or an informal arrangement reflecting an ongoing relationship between the parties.

Many commenters objected to the inclusion of contractors within the scope of the rule, believing that employers should not be accountable for a contractor's compliance with the rule because employers have little or no control over contractors or their employees.

While other commenters did not specifically object to the inclusion of contractors, they did object to the scope of the definition of contractor and recommended that it be defined to include only those who perform work or provide service under a formal written agreement.

Other commenters sought to exclude contractors in rural areas contending that many simply would refuse to do business with the recipient rather than submit to a sophisticated drug testing program. The remaining commenters requested that we exclude only contract mechanics from the definition.

FTA Response. In response to comments, we have made a number of changes to the wording of this safety-sensitive function, although the basic concepts in the NPRM remain unchanged.

The final rule includes direct employees, contractors and their employees, and applicants under the definition, but reflects the following changes. First, we specifically include volunteers in the definition because, as noted above, we define "safety-sensitive" functionally and look only to the function that a person performs, not whether they receive pay for their work.

Second, while many commenters objected to including contractors who perform safety-sensitive functions, we have for the most part continued to include them in light of legislative history on this issue. The following was said during the debate on the bill:

Drug and alcohol-testing requirements must not be circumvented through contracting out of work.

Safety-sensitive employees of recipients of the Federal transit grant money identified in the bill, and those safety-sensitive employees working for contractors of such recipients must be covered exactly to the same extent and in the same fashion. I know that I speak

for all conferees when I say that we will not tolerate a situation where employees performing substantially the same safety-sensitive function are covered or not covered depending on whether they work directly for a public authority or an outside contractor. 137 Cong Rec. S14766 (daily ed. Oct. 16, 1991.) (Statement of Sen. D'Amato).

On the other hand, we are sympathetic to the persuasive arguments of rural operators on this issue, and specifically exclude from coverage under the rule contract mechanics who perform work or provide services for section 18 rural recipients. We believe that the potential cost and hardship of including such contractors outweighs any benefits including them might bring, since so many rural operators believe that they simply would be unable to get any outside servicing if providers of that service were subject to this rule.

E. Pre-employment/Pre-duty Testing

Although the NPRM included the pre-employment/pre-duty tests within one provision, in fact they apply to different types of workers—applicants in one instance, and transferees from a nonsafety-sensitive position to a safety-sensitive position in the other. Under the NPRM, an applicant could not be hired unless he passes a pre-employment drug test, nor could a transferee, already employed by the employer, perform a safety-sensitive function until she passes a drug test. Under the specific notice provision, the NPRM required applicants and transferees to be notified that they must submit to a drug test. Moreover, a pre-employment drug test could not be waived by the employer, which distinguished the anti-drug NPRM from the alcohol NPRM. (The alcohol NPRM proposed to allow the employer in certain limited circumstances to accept another alcohol test result in lieu of a pre-employment test.)

Commenters focused on these issues. Specifically, commenters requested that we add a notification requirement to the pre-employment/pre-duty testing provision of the final rule. On the other issue, commenters stated that employers should not be able to accept the results of a drug test administered under the requirements of another DOT agency.

FTA Response. In the NPRM we did require an employer to notify an applicant that he or she would be required to take a drug test with a verified negative result. We have made no changes to this requirement in the final rule. As noted above, some commenters thought that we allowed an employer to use certain existing test results in lieu of a pre-employment test.

We do not. That provision was not in the drug NPRM, nor is it in this final rule.

We have made another change in response to comments on our related alcohol rule. Some commenters were confused by the term pre-duty testing and assumed that it meant that an employee must be tested every time they were about to perform a safety-sensitive function. This is not the case. We meant to apply that provision to transferees from a nonsafety-sensitive position to a safety-sensitive position. To clarify our intent we have deleted the phrase "pre-duty" (in the context of pre-employment drug testing) from the final rule.

F. Reasonable Suspicion Testing

Commenters responding to this general area raised numerous issues. Before discussing those issues, however, we first briefly summarize the reasonable suspicion testing provision as it appeared in the NPRM.

Reasonable suspicion testing is specifically required by the Act, and the NPRM basically authorizes an employer to conduct a test when it believes the employee is exhibiting certain characteristics of prohibited drug use. The NPRM never identifies or defines those characteristics, but authorizes an employer to require a reasonable suspicion drug test on the basis of specific, contemporaneous, articulable observations concerning the appearance and behavior of the covered employee, which characterize prohibited drug use.

Moreover, those observations must be made by a supervisor trained in detecting the symptoms of drug use. The NPRM specifically required that a supervisor receive two hours of training, which must include information about the manifestations and behavioral characteristics indicating prohibited drug use.

Commenters took a number of positions on this issue. Some wanted only one supervisor to make the reasonable suspicion determination, others wanted two. Some believed that the test could be based on the observations of a third party, such as a transit passenger.

Commenters also took different positions on the amount of time a supervisor should be trained, although most thought that one hour was not enough time to adequately train a supervisor. Some commenters suggested four hours of training, others suggested four hours of combined alcohol and drug training, and yet another suggested five to ten hours of training with the additional requirement of a proficiency certification.

Many commenters suggested that the language of the reasonable suspicion provision be broadened to include other factors in the determination. For instance, some suggested that employers be allowed to review an employee's attendance records for absenteeism and tardiness. Others suggested that an employer be allowed to examine other records indicating whether the employee had any moving traffic violations, occupational injuries, or operating rule violations. And others suggested that an employer be able to look at the pattern of the employee's conduct both on and off the job.

Lastly, the commenters discussed the matter of whether there should be written documentation of a reasonable suspicion determination. The NPRM did not require written documentation, but stated that any document generated as a result of a reasonable suspicion determination must be maintained for a year. Several commenters recommended that a written determination be required, with one suggesting that a checklist also be required. One commenter recommended that a second supervisor concur in the written determination before a reasonable suspicion test could be conducted. Another commenter suggested that written documentation be required only if the employee has a verified positive drug test result and subsequently was disciplined.

FTA Response. In the final rule we essentially have retained the reasonable suspicion provision from the NPRM, with only one change, because we believe it adequately balances the rights of employees against the rights of the traveling public. For instance, we believe that the observations must be made by a supervisor trained in detecting the symptoms of prohibited drug use rather than by some third party. (Of course a third party could alert a transit operator about a particular situation, which might trigger a supervisor to pay particular attention to the affected employee.)

We also believe that a determination made by a single supervisor trained in detecting the signs of drug use adequately protects the employee, and we were concerned about the cost of requiring two supervisors to make the determination.

However, although many commenters supported the requirement that supervisors receive two hours of training, we have changed this requirement in the final rule, being sensitive to the costliness of such training. Supervisors who make reasonable suspicion referrals will be required to undergo only one hour of

training. Individual employers of course are free to provide as much additional training beyond the required one hour as they like. Employers also are allowed to combine drug and alcohol training, provided the required time frames are satisfied.

The standard used to authorize a reasonable suspicion test remains unchanged in the final rule, which means that a supervisor may consider only short-term indicators of drug use. We stress that long-term indications of drug use such as absenteeism or tardiness or moving traffic violations cannot be used as the basis for conducting a reasonable suspicion drug test, which must only be based on contemporaneous and articulable observations. Of course, a supervisor may particularly be alert to the conduct and job performance of an employee based on the supervisor's long-term knowledge of the employee.

We do not require a supervisor to document an employee's behavior in writing. We do, however, provide that any documents generated by the determination must be maintained for one year. Again, the final rule does not require an employer to document each and every reasonable suspicion determination, although an employer would be prudent to do so.

G. Random Testing/Random Testing Rate

The random testing provision generated many comments, with most commenters proposing the adoption of a particular random testing rate or a particular method of determining a random testing rate. Other commenters were concerned about the frequency of random testing and how the test should be administered. Several commenters sought clarification of certain aspects of the provision.

Several different alternatives for determining the random testing rate were offered. Many commenters suggested a flat rate, ranging from 10 percent to 50 percent.

Others suggested a performance based rate, that is, a rate determined by the results of random testing. Under such a scheme, if the number of verified positive test results exceeds a specified rate (for example, 1 percent), then the employer would be required to test at a higher specified random rate (for example, 50 percent). If the number of verified positive test results is less than the specified rate, the employer would be required to test at a reduced random rate (for example, 25 percent). One commenter recommended that an employer could randomly test 20 percent of its employees if less than 3

percent of its random tests were verified, but if the number of verified positives exceeded 3 percent the employer would have to raise its testing rate.

Other variations were proposed. Several commenters suggested that we set a minimum random testing rate of 10 percent, but give an employer the discretion to test at a higher rate based on its own experience. Another commenter suggested that we require a random rate below 50 percent and allow an employer to set its own rate for different classes of employees. Yet another commenter recommended that we set a rate anywhere from 10 percent to 50 percent but allow an employer to reduce its rate if it has programs, such as training and rehabilitation programs, in addition to those required by the final rule.

Another commenter recommended that random testing be phased in, 15 percent the first year, 20 percent the second year, and 25 percent thereafter, presumably to ease cost and administrative burdens. Another commenter, however, recommended that those who had never randomly tested employees should be required to test at a higher random rate than those who have had a program in effect. Lastly, one commenter believed that FTA should not set the rate at all, but the rate should be determined by an agreement between labor and management. Aside from the random testing rate issue, commenters also addressed how the test itself should be conducted. In this regard, several commenters were concerned about how truly random testing would be, and suggested that the testing itself should be conducted by an outside agency.

FTA Response. In determining the random drug testing rate, FTA has considered not only the comments on this issue but other factors as well. Most importantly, because FTA, unlike other DOT agencies, has not previously required drug testing, we do not know the extent of drug use in the mass transit industry. We therefore have established a random drug testing rate of 50 percent, the rate at which other DOT agencies have been requiring random testing since 1989.

We recognize, however, that random drug testing does subject a large number of employees to urine testing and is costly. We have thus today issued an NPRM requesting comment on whether we should adopt a performance based random drug testing rate. For a complete discussion of this issue, please see the NPRM entitled "Random Drug Testing Program" published elsewhere in today's issue of the Federal Register.

Moreover, the NPRM required random testing to be completely random, which means that it must be unannounced. It must also be unpredictable, which is the reason we proposed that the tests be spread reasonably throughout a 12-month period. We have retained both of these requirements in the final rule.

We do not, however, require the test to be conducted by an outside agency. Although requiring a third party to conduct the random drug testing may afford an employee additional protection, we believe the final rule provides an employee with sufficient protection. Among other things, the rule requires an employer to use a scientifically valid method to randomly select employees from a pool in which each employee has an equal chance of being selected.

Lastly, some commenters are confused about an issue raised in the alcohol NPRM that does not relate to this rule. In our companion alcohol NPRM, we restricted random testing to the time frames just before, during, or just after the employee performs a safety-sensitive function. Several commenters to the drug rule asked us to explain the reasoning for this restriction.

We emphasize that this limitation does not apply to the drug rule. Because drugs are prohibited substances, a safety-sensitive employee may be randomly tested for drugs at any time while on duty. In contrast, alcohol is a legal substance, and an employee who is not performing or who will not be performing a safety-sensitive function within four hours may engage in a legal activity. Thus the alcohol rule strictly limits the period of time when the employee is subject to random testing.

H. Post-accident Testing

The comments on this provision concerned three basic questions: when should a test be performed following an accident, which employees should be tested, and who should conduct the testing.

In determining when a post-accident test should be required, the NPRM distinguished between fatal and nonfatal accidents. After an accident involving a fatality, the NPRM required the employer to test employees who were on duty and present in the vehicle at the time of the accident as well as mechanics involved in the vehicle's most recent maintenance. After an accident not involving a fatality had occurred, the employer was required to test certain employees unless their performance could be completely discounted as a contributing factor to the accident.

Instead of this dual standard in the NPRM, one commenter suggested that we adopt a reasonable cause standard for determining when a post-accident test should be performed, regardless of the seriousness of the accident.

Although other commenters did not specifically propose a reasonable cause standard, they did object to the scope of the fatal accident provision, in which all safety-sensitive employees on-duty and present in the vehicle at the time of the accident, as well as mechanics, must be tested.

Most of the comments on who should be tested stressed the difficulty of testing mechanics, especially when vehicle maintenance is contracted out. Some flatly stated that testing mechanics in rural areas was not practical, while others stated that requiring the testing of mechanics after an accident is unreasonable. While some commenters opposed the testing of any mechanics, others suggested that we include only certain mechanics. In this connection, one commenter suggested that we require the testing only of those mechanics who have maintained the affected vehicle within the two weeks before the accident occurred. Another commenter made the same recommendation but suggested that only those mechanics who maintained the vehicle two days before the accident be tested.

Although most comments concerned the testing of mechanics, one commenter also suggested that we require the testing of drivers only if they are contributorily negligent.

Commenters also stressed the difficulty of testing employees after an accident. They cited examples of employees leaving the scene of the accident, or police or hospital personnel refusing to allow the employee to be tested by the employer. These commenters contended that the rule should address these problems.

FTA Response. FTA in its final rule has developed a dual post-accident testing provision: after accidents involving a fatality, and after accidents involving bodily injury or property damage. The Act requires us to mandate a drug test whenever someone dies as a result of a mass transit accident, and we thus have expressly rejected the adoption of a probable cause standard in such cases. Simply put, if an accident involving a fatality has occurred, a drug test must be given within 32 hours to those safety-sensitive employees on-duty in the vehicle at the time of the accident.

Other employees' conduct may contribute to an accident, however. For example, if two trains are placed on the

same track and collide, the performance of safety-sensitive duties by a vehicle controller could have contributed to the accident. If there are indications that brake failure was involved in a bus accident, and the vehicle's brake system was maintained a brief time before in the garage by an identifiable mechanic, the performance of that mechanic could have contributed to the accident. In situations of this kind, the rule directs the employer to test the other employee, but only if the employer determines, based on the best information available at the time, that the other employee's performance could have contributed to the accident. Implementing this provision rests substantially on the good judgment of the employer. For example, if the performance of the relevant work by a mechanic occurred long enough ago (e.g., more than 32 hours before a test could be administered) that a meaningful test could not be administered, the employer would not be expected to administer the test. If the bus was recently in the shop only for an air conditioning repair, there would be no point in testing a mechanic after an accident in which brake failure may have been involved.

With respect to non-fatal accidents involving road surface vehicles (e.g., buses and vans), a covered employee on duty in the vehicle at the time of the accident would have to be tested if the employee had received a citation from a law enforcement officer. As in the case of fatal accidents, the employer would test other employees if the employer determined, based on the best information available at the time, that such an employee's performance could have contributed to the accident. Examples of such a test could include the situation of the mechanic mentioned above and a situation in which a bus driver was not cited by local law enforcement personnel but the employer, in its good judgment, determined that the driver's performance could have contributed to the accident.

With respect to other vehicles (e.g., rail vehicles), the employer would have to test covered employees on duty in the vehicle at the time of the accident, unless the employer determined, based on the best information available at the time, that an employee's performance could be completely discounted as a contributing factor in the accident. This is a different standard than in the case of road surface vehicles, because there is little likelihood of an on-the-spot law enforcement citation to the operator of vehicles like rail cars. As in the other post-accident testing situations, the employer could make a judgment to test

other covered employees, if the employer concluded that their performance could have contributed to the accident.

After an accident has occurred, an employer—not police or hospital personnel—must test affected employees for the use of prohibited drugs. The rule does not permit a waiver of the employer's obligation to test an employee after an accident, nor does it allow an employer to use the results of laboratory findings of a drug test administered by police or hospital personnel.

Under the final rule, however, an employee may be taken to a medical treatment facility immediately after an accident without being tested by the employer. An employee also may leave the scene of an accident, without being tested, so long as he remains readily available for testing, which means that the employer knows the whereabouts of the employee until he is tested and that the employee is available to be tested immediately after being notified by the employer and within 32 hours of the accident. Thus an employee may receive medical attention or respond to police questions or seek assistance for injured individuals.

1. Return to Duty/Follow-up Testing

The comments concerning these two kinds of testing focused primarily on the roles of the employer and the Substance Abuse Professional (SAP). The NPRM proposed authorizing the SAP to determine not only when an employee may return to duty after a verified positive drug test result, but also how many follow-up tests an employee should take and for what period of time.

Many commenters objected to the extent of authority given to the SAP under the NPRM. An employer, not the SAP, should determine if and when an employee may resume a safety-sensitive function after a verified positive drug test result, these commenters stated. They also contended that an employer should control the follow-up testing requirements, such as the length of time an employee must submit to follow-up testing and the number of tests the employee must take and pass annually.

Other commenters recommended that the final rule prescribe in detail the follow-up testing requirements, with several offering suggestions. One commenter recommended that the rule require 60 months of follow-up testing, with 12 tests required in the first year and 6 annually thereafter. Another commenter recommended 60 months of testing with a prescribed number of tests over the entire 60 month period; another a 36 month follow-up period with 6

tests required annually; and another a 24 month follow-up testing period with 3 tests required the first year. And, lastly, one commenter stated that the rule should not recommend a specific number of follow-up tests at all.

FTA Response. The final rule retains the authority of the SAP. In making this decision, we strove to balance the rights and privacy of the employee against the safety of the traveling public. Because of the extensive credentials required to be a SAP, we believe that they are most qualified to make the necessary decisions concerning the ability of an employee to return to his or her safety-sensitive position. In addition, because studies have shown that the relapse rate is highest in the first year of recovery, we mandate a minimum of 6 drug tests during that time. After that period, however, we believe that the SAP should determine when follow-up testing should end; in any event, it must end if 60 months have elapsed from the time of the employee's return to duty. We note that an employer may require additional follow-up testing under its own authority. It is important to emphasize, moreover, that during the 60-month period the employee remains separately subject to random testing as well.

J. The Split Sample Procedure

The NPRM proposed that the urine sample be split, and poured-off into two specimen bottles. This provides an employee with the option of having an analysis of the split sample performed at a separate laboratory should the primary specimen test result be verified positive. The NPRM would have provided an employee 72 hours to decide whether to have the analysis of the split sample performed.

Only a few commenters responded to this provision, with most recommending that the employer be allowed to test the urine sample for more than the five prohibited drugs. Others focused on the amount of time the NPRM gave the employee to request that the secondary sample be tested. Some contend that 72 hours is too short a period of time, and others asked whether the 72 hours included weekends and holidays. Yet another commenter asked that the rule require the employee to pay for the test of the split sample.

FTA Response. On the time period issue, an employee, after being notified by the Medical Review Officer (MRO) that the primary specimen has been verified positive, must request within 72 hours that the split be tested. Although several commenters objected to the 72-hour time period, the Act specifies that

an employee must be given three days to request that the split sample be analyzed. In the final rule we interpret three days to mean 72 hours, and because most transit systems operate seven days a week and during holidays, we have decided that the 72-hour time period includes both holidays and weekends.

Concerning who pays for the test of the split sample, the rule is silent, and this issue properly must be decided at the local level.

Finally, for a complete discussion of FTA's and DOT's response to this issue, please see part 40 and its preamble published elsewhere in today's issue of the Federal Register.

K. Treatment

The NPRM proposed that any covered employee who has a verified positive drug test result must be advised by his employer of the resources available to help him resolve problems associated with drug use and be evaluated by a SAP. The NPRM neither authorized nor prohibited an employer from disciplining or discharging an employee because he has a verified positive drug test result for prohibited drug use; it simply stated that such an employee must be removed from his safety-sensitive position.

Several commenters objected to our silence on this issue, and asked us to clarify the rule by specifically authorizing the employer to take whatever disciplinary action the employer deems necessary.

The remaining commenters addressed the issue of rehabilitation. One commenter suggested that we mandate rehabilitation and treatment. Another commenter recommended that the final rule require reinstatement in addition to rehabilitation. Yet another commenter stated that the final rule should not address the issue of rehabilitation, which should be decided by the employer and the union. Lastly, a commenter stated that an employer should not be required to refer an employee to an SAP when the employer's policy is to discharge any employee who has a verified positive drug test result.

FTA Response. FTA has retained the language in the NPRM on this issue. We thus remain silent on whether an employer may dismiss or disqualify an employee who has a verified positive drug test result, an issue best decided at the local level.

Concerning rehabilitation, we believe that we have met the requirements of the Act, which state that the rule must provide for identification and opportunity for treatment of employees

who are determined to have used prohibited drugs. In this regard, we require that an employee who has a verified positive drug test result be evaluated to determine whether he needs assistance. Such an employee may return to his safety-sensitive position after he has properly completed a course of treatment as determined by an SAP, and takes a return to duty drug test with a verified negative result.

If an employee undergoes treatment, the rule does not address the issue of who should pay for it. We believe that this issue should be decided at the local level. Nor does the rule deal with the issue of recidivism, when an employee has repeated verified positive drug test results and has repeatedly been referred to treatment. Again, we believe that issue should be decided at the local level. This rule requires the removal of an employee from a safety-sensitive position if the employee has a verified positive drug test result, but does not address employment or disciplinary issues in connection with such action.

L. Training

The NPRM proposed that supervisors who make reasonable suspicion determinations receive 120 minutes of training on the physical, behavioral, and performance indicators of probable drug use, which would enable the supervisor to make an informed reasonable suspicion determination. In addition, the NPRM proposed that all safety-sensitive employees be trained about the effects of drug use on health, safety, and the work environment.

We received numerous comments on this issue, virtually all of them in favor of requiring training, at least for supervisors. For employees, most commenters were silent, although one favored requiring 60 minutes of training and another asked that we help develop a curriculum for a general educational program.

Because almost all of the commenters were in favor of training for supervisors, many commenters proposed certain training specifications. Some commenters proposed a combined drug and alcohol training program; one commenter specifically recommended four hours of combined drug and alcohol training, while another made the same recommendation but added a one-hour yearly refresher course.

The remaining commenters did not specifically recommend that the drug and alcohol training be combined. Instead, one commenter suggested that supervisors be required to receive four hours of training and that the class size be limited to four individuals. Other commenters recommended a full day of

training, one suggesting that supervisors should be certified after satisfactorily being trained. Lastly, several commenters stated that we should require interactive training.

FTA Response. FTA believes that training will greatly improve the efficacy of the anti-drug program, and we agree with the commenters who favor a training requirement for both safety-sensitive employees and supervisors. We note, however, that most of the comments addressed one of two areas, the amount of training required and the actual content of the program itself.

We have decided to adopt the recommendation of one commenter and require all safety-sensitive employees to receive at least 60 minutes of training. We believe that training for covered employees is important because of the profound ramifications of prohibited drug usage on personnel health, public safety, and the work environment. We also believe that one hour of training is sufficient to train supervisors who may make reasonable suspicion determinations to recognize the signs and symptoms of drug use; moreover, an employer may, at its own discretion, choose to provide additional training. These requirements are one-time only; the final rule does not require annual or recurring training, although an employer certainly is not prohibited from providing any additional training. Moreover, we do allow employers to combine drug and alcohol training providing that the minimum time requirements are observed.

Nor does the final rule specify the content of the training programs; since an employer should develop a program to meet its own needs. We believe that it would be inappropriate for the rule to specify the content of this kind of training program. The employer best knows its workforce and the needs of its employees.

M. Management Information System (MIS) Reporting Requirement

The vast majority of comments on this issue concerned the State's role in record collection. Under the NPRM, we proposed to require States to collect and forward to FTA the annual reports prepared by their subrecipients. Because the State merely "passes through" the Federal grant funds to a subrecipient, most commenters believed that the State should not be responsible for ensuring the accuracy of the information collected, nor for submitting the reports to the FTA on time. In fact, one commenter suggested that only large employers should be required to keep

and submit detailed information on test results.

Some States focused on the overlap between this NPRM and a rulemaking required under section 28 of the FT Act, which requires certain States to oversee the safety of certain kinds of fixed guideways. Some commenters explained that they would not be able effectively to oversee certain fixed guideway systems unless they were given access to the records generated under this rule.

Finally, some commenters asked that we provide States an extra 60 days from the annual February 15th reporting date.

FTA Response. In the final rule we have retained the requirement that a State collect and submit to FTA on behalf of its subrecipients the data required under this rule. This requirement is consistent with the fundamental legal relationship between FTA and the direct recipient of Federal funding, which in some instances is a State, in which case the State must collect and submit the annual report required under this rule and meet the same reporting deadline as other recipients. The due date of the annual report has been changed to March 15. States must collect the reports prepared by their subrecipients and their contractors, as appropriate, and forward the reports to the FTA.

The final rule includes two different reporting forms, FTA Drug Testing Management Information System (MIS) Data Collection Form (Appendix B) and FTA Drug Testing Management Information System (MIS) "EZ" Data Collection Form (Appendix C). Appendix B must be used in reporting both verified positive and negative drug test results; Appendix C must be used by employers who have no verified positive drug test results to report.

FTA intends to combine the drug and alcohol regulations' reporting forms within two to three years after implementation.

We appreciate those comments directing our attention to the overlap between this rule and the State Safety Oversight NPRM published in the Federal Register on December 9, 1993 at FR 64856. We have amended those provisions requiring access to certain facilities to also permit access by State oversight agency officials to facilitate their oversight role as proposed in the State Safety Oversight NPRM.

N. Implementation Date

The NPRM proposed to require compliance with this rule within six months of publication in the Federal Register for large employers and within one year for States and small employers.

This provision contrasted with implementation periods proposed in the alcohol NPRM, which were one year for large employers and two years for States and small employers.

Several commenters strongly favored implementing both the drug and the alcohol rules simultaneously. Another commenter recommended that, for budgeting reasons, FTA key the implementation period to the fiscal year. Other commenters recommended specific implementation periods. For instance, one commenter suggested that all employers be given four months while another suggested three to six months. Another commenter recommended that large employers comply with the rule within six to nine months of the publication date.

FTA Response. In the final rule, we have decided that large employers must implement their drug testing programs on January 1, 1995, while small employers will have until January 1, 1996 to implement their programs. This is consistent with the implementation date of our related alcohol rule and will ensure that the annual MIS report data will coincide with the calendar year.

We provide small employers additional time to implement their rule because they may find it necessary to form consortia. Large employers in most instances already have experience in testing their employees for drug use.

We further note, in response to several inquiries, the rule provides no authority for an employer to begin its program before the implementation dates included in this rule.

O. Combined Drug and Alcohol Rules

Many commenters urged us to combine the drug and alcohol NPRMs into one final rule, or, in the alternative, to combine common aspects of both rules, such as the training and reporting requirements.

FTA Response. We have decided not to combine the drug and alcohol testing rules at this time because there are significant differences between them. For instance, the random rate for the two rules differ, 25 percent for alcohol and 50 percent for drugs. Also, the time period during which an employee may be subject to random testing differs in the two rules. The alcohol rule contains an entire subpart, Prohibitions, which specifies when an employee cannot use alcohol. In contrast, the drug rule contains no comparable subpart because prohibited drugs are controlled substances. On the other hand, we do allow an employer to combine certain aspects of the rules, most notably the training requirements. In addition, we encourage the employer to formulate

and promulgate one policy statement concerning both drugs and alcohol.

P. Indian Tribal Governments

Several commenters have asked us to clarify the applicability of the rule to Indian tribal governments and have suggested that we preempt Indian tribal law. Because Indian tribal governments are not subject to State law or regulation, these commenters are concerned about the ability of a State section 18 recipient to require an Indian tribal government subrecipient to comply with this regulation.

FTA Response. As a general matter, statutes apply to Indian Nations or tribes unless (1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended the law not to apply to Indians on their reservations, *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985).

In this regard, there is no legislative history indicating congressional intent not to apply the Act to Indian tribes. We have no information, moreover, on the issues addressed in points one and two. In the absence of any such information, we conclude that the Act would preempt Indian tribal law but of course would consider any arguments to the contrary based on points one and two.

Q. Waivers

Several commenters have asked us to waive the application of the rule to certain categories of employers. For instance, one commenter recommended that employers with less than 16 employees be excluded from complying with the rule. Another recommended that any section 18 recipient certifying that it has not had an alcohol or drug related accident in three years should be exempted from the rule.

FTA Response. Language in a report of the Senate Committee on Commerce, Science, and Transportation accompanying the Act addressed the issue of FTA granting waivers of the rule in whole or in part:

The Committee is aware of concerns raised with regard to the difficulties some believe may be faced by small transit operations located in rural areas in complying with [FTA] drug and alcohol testing requirements. If, after notice and opportunity for comment, the Secretary determines that a waiver for certain operations from such requirements would not be contrary to the public interest and would not diminish the safe operation of rural transit conveyances, the committee would not object to a waiver, in whole or in part, of the application of regulations issued

pursuant to this bill with regard to recipients of funds under section 18 of the [Federal Transit Act, as amended]. S. Rep. No. 80, 102d Cong., 1st Sess. 36 (1991).

Notwithstanding this legislative history, the Act itself does not specifically authorize the FTA to "waive" particular requirements of the rule. Nonetheless, we believe we can implement the rule in such a way that it minimizes burdens on small operators.

In this regard, we have adopted several provisions to ease the rule's impact on small operators. Small operators—which include section 18 rural providers and small recipients of section 9 funds—are provided additional time to comply with the rule. We have also exempted from the rule's coverage mechanics under contract to or with informal agreements with a section 18 employer. To reduce costs and administrative burdens, we allow and encourage section 18 providers to join a consortium of operators to comply with the rule.

III. Section-by-Section Analysis

Subpart A—General

A. Overview. (§ 653.1)

This section provides an overview of the anti-drug rule. Basically, the rule requires certain recipients of FTA funding to establish and implement an anti-drug program consisting primarily of a program in which a safety-sensitive employee's urine is tested for five prohibited substances under certain circumstances. The rule further specifies that both safety-sensitive employees and their supervisors must be given educational materials and be trained about the effects of drugs on the human body and on an individual's ability to perform duties while under the influence of drugs. Employers must establish, publicize, and promote an anti-drug policy describing requirements of this program and the consequences of any violation of it. The rule specifies the consequences for any recipient that fails to implement the requirements of this rule.

B. Purpose. (§ 653.3)

This section explains that the rule is designed to promote public safety by requiring a recipient to establish and implement an anti-drug program to detect the use of prohibited drugs, by urine testing, and to deter the use of those drugs by educating and training safety-sensitive employees about the safety and health ramifications of drug use and abuse.

C. Applicability. (§ 653.5)

This section describes FTA's jurisdiction over recipients and covered employees and how it may overlap with that of other modal agencies; whether section 16(b)(2) recipients must comply with this rule; the effect of the rule on user-side subsidies; and the effect of the rule on those who may no longer receive FTA funding.

1. FTA grant programs under sections 3, 9, and 18 and the Interstate Transfer Program. Under the section 3 discretionary grant program, FTA funds three categories of capital projects: the construction of new rail projects; the improvement and maintenance of existing rail and other fixed guideway systems; and the rehabilitation of bus systems. Under sections 9 and 18, the formula grant programs, FTA funds both capital and operating assistance to specific categories of recipients that receive Federal funds under a statutory formula based on population, population density, and other factors. Generally, urbanized areas receive section 9 funding directly, while nonurbanized areas receive section 18 funding through the State.

FTA also provides funds under 23 U.S.C. section 103(e)(4), the interstate transfer program. Under this program, FTA provides funding to States and localities for capital transit projects in lieu of nonessential interstate highway projects. Hence, recipients of these types of FTA funding may be States, transit agencies, or other kinds of localities, but all such recipients are public entities.

2. FTA jurisdiction. FTA is a Federal agency that makes grants of Federal financial assistance under various statutory provisions. Under all of these provisions, the agency's relationship is with the direct receiver of Federal financial assistance, the recipient. Such a recipient of Federal funds must comply with a variety of Federal requirements, including this rule, and enters into a grant agreement with the FTA to that end. After accepting a grant from the FTA, a recipient is responsible for ensuring that it, or any entity that it uses to provide mass transportation services, will comply with all relevant Federal requirements.

While the Act requires us to issue this drug testing rule, it does not change the fundamental relationship between FTA and a direct recipient of Federal financial assistance.

That is, FTA does not directly regulate covered employees, which means that FTA has no authority directly to deal with a covered employee under any circumstances.

Rather, the Act authorizes FTA to require a recipient to implement an anti-drug program, and it is the recipient that is responsible for assuring that covered employees comply with the rule. If a recipient fails to do so, FTA will withhold Federal funding.

3. *Multi-modal jurisdiction.* As discussed below, recipients may be regulated by another DOT modal agency, such as the Federal Railroad Administration (FRA), which regulates railroads, the Federal Highway Administration (FHWA), which regulates holders of Commercial Driver's Licenses (CDL), or the United States Coast Guard, which regulates certain vessels and mariners.

a. *Federal Railroad Administration.* The FRA regulates railroads. A railroad is defined in the Federal Railroad Safety Act of 1970 as: [a]ll forms of non-highway ground transportation that run on rails or electromagnetic guideways, including (1) commuter or other short-haul rail passenger service in a metropolitan or suburban area, as well as any commuter rail service which was operated by the Consolidated Rail Corporation as of January 1, 1979, and (2) high speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads. Such term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation.

45 U.S.C. § 431(e) (1988).

If an FTA recipient solely operates a commuter railroad, those railroad operations are subject to FRA's drug rule. Such a recipient must certify to the FTA that it complies with FRA's rule as provided for under section 653.83 of this part. See Appendix A for the certification such a recipient must execute.

If a recipient operates a railroad as well as other mass transit services, its railroad operations are subject to FRA's rule while its non-railroad mass transit operations are subject to the FTA rule.

b. *Federal Highway Administration.* Before the Act, FHWA was authorized to regulate only interstate motor carriers. Hence, when FHWA issued its anti-drug rule in 1988, most of FTA's recipients, which generally operate intrastate, were not affected by it. The Act, however, authorizes FHWA to regulate intrastate motor carriers and specifically requires it to issue an anti-drug rule which applies to intrastate as well as interstate motor carriers. Thus, to avoid subjecting recipients who are also motor carriers to two different

rules, FTA and FHWA have agreed that these recipients are subject only to FTA's anti-drug rule.

c. *United States Coast Guard.* If a recipient operates a ferry boat service, it is subject both to FTA and Coast Guard anti-drug regulations with regard to that service. Applicable Coast Guard regulations may be found at 33 CFR part 95 and 46 CFR parts 4 and 16. Generally, the FTA's drug testing regulation is consistent with the Coast Guard's. Moreover, both FTA and the Coast Guard require employers to follow 49 CFR part 40 when conducting a drug test. Unlike the Coast Guard, however, FTA requires an additional procedure set forth in this rule—which is not in Part 40. That is, we require that in the case of a verified positive drug test result, the covered employee be referred to a substance abuse professional (SAP) for evaluation.

As noted earlier, if a recipient complies with this part 653, the recipient generally will also be in compliance with the Coast Guard regulation. To assist in the compliance with both regulations, we note in various provisions of the Section-by-Section Analysis portion of this preamble the differences between the FTA and Coast Guard rules.

4. *Covered employees of recipients.* As noted above, FTA does not directly regulate employees or workers who are subject to the provisions of this rule through the actions of their employers. This general proposition is not true of FHWA and the Coast Guard, which use licensing actions or other measures to enforce their safety rules, including their anti-drug rules. A recipient's safety-sensitive employees thus may be subject to licensing actions of these agencies, even though the recipient is regulated by FTA and its employees are covered only by FTA's anti-drug regulations. For example, a CDL holder employed by an FTA recipient remains subject to the Commercial Motor Vehicle Safety Act of 1986, and the consequences that attach to a violation of it. For example, a CDL holder convicted of driving under the influence of drugs or alcohol may have his or her Commercial Driver's License suspended or revoked. Similarly, the Coast Guard is authorized to revoke a license, certificate of registry, or merchant mariner's document of a crewmember under certain circumstances. Coast Guard's relevant provisions specifying the rights and responsibilities of crewmember are located in 46 CFR parts 4, 5, and 16 and 33 CFR part 95.

5. *Section 16(b)(2) recipients.* Some entities receive funding under section 16(b)(2) of the FT Act, which provides

capital assistance, through a State, to organizations that provide specialized transportation services to elderly persons and persons with disabilities.

While some commenters suggested that we cover section 16(b)(2) recipients under the rule, we do not do so, noting that the Act references recipients of funds under sections 3, 9, or 18 of the FT Act or section 103(e)(4) of title 23 of the U.S. Code, but not section 16. Note, however, that a section 16(b)(2) recipient may be covered by the anti-drug regulation published by the FHWA elsewhere in today's Federal Register.

6. *User-side subsidies.* A user-side subsidy refers to the practice of providing passengers publicly subsidized script or vouchers, which the passenger then uses to pay for transportation from a private carrier such as a taxicab company. In essence, a recipient provides transportation services indirectly through such subsidies.

The regulation applies to certain recipients of FTA funding, and to transit operators providing service under contract or other arrangements with those recipients. To the extent that a taxi operator does not provide service under an arrangement with an FTA recipient, but is chosen at random by the passenger, it would not be subject to the rule. If, however, the taxicab company or private operator does provide service under an arrangement with an FTA recipient, it is covered by the rule as a contractor, as defined by the rule. In such cases, the taxi company may wish to designate only certain drivers to provide such service, in which case only those designated drivers would be subject to the rule's drug testing program.

7. *Continuing Federal interest.* Not all recipients receive a Federal grant or grants for capital or operating assistance each year under the formula or discretionary programs. Some may receive capital assistance only when they need to purchase equipment or construct or repair a facility, which could occur once every few years. Indeed, there may be a recipient that receives a capital grant just once over a five or ten year period. It is important to emphasize in these cases that once a recipient has received an FTA capital grant after the effective date of this rule and has therefore agreed to comply with the rule, it must continue to comply with the rule (and other Federal requirements) during the useful life of the equipment or facility funded under the grant. In short, this rule remains in effect so long as the grant-acquired assets and related grant obligations remain in effect, and is not contingent

upon a recipient receiving Federal funds each year.

This is not the case with operating assistance, however, which essentially is "used up" each year and is not considered to have a useful life beyond any given year. Thus in the event a recipient receives an operating assistance grant just once (and has not separately received a capital grant), it would only have to comply with this rule for that one year. This is probably a hypothetical example, however, since most recipients receive operating assistance on an annual basis, while others receive capital funding at some point, in which case they would have to comply with the rule over the life of the grant-acquired asset.

D. Definitions. (§ 653.7)

1. *Accident.* An accident may trigger a post-accident alcohol test, and is defined as an incident in which a person has died or is treated at a medical facility or when there has been property damage resulting in the towing of a vehicle or the removal of a transit vehicle from revenue service.

For accidents not involving a fatality, we have created two categories of vehicles. The first is for "road surface" vehicles, including buses, vans, automobiles, and electric buses. For this category, an accident is an occurrence resulting in a vehicle—either a mass transit vehicle or another vehicle—suffering disabling damage and having to be towed away. This definition parallels that used by FHWA for commercial motor vehicle accidents, and includes language drawn from FHWA's regulations specifying what kind of damage is viewed as disabling.

The second category includes rail cars, trolley buses and trolley cars, and vessels. This category would also include other kinds of transit conveyances operated by FTA recipients, such as people movers, inclines, and monorails. An accident is deemed to occur to such a vehicle when the occurrence results in the vehicle being removed from revenue service. FTA views an accident happening when the vehicle is not operating in revenue service (e.g., an accident that occurs in a rail yard) as falling within this definition if it results in damage that would result in a comparable vehicle being withdrawn from revenue service or results in a delay in the vehicle being placed into or returned to revenue service.

2. *Administrator.* Administrator means the Administrator of the Federal Transit Administration or the Administrator's designee.

3. *Anti-drug program.* This definition describes the scope of the program created by this rule, which encompasses testing and training intended to promote safety by deterring the use of prohibited substances.

4. *Canceled test.* This definition describes a test that has not taken place, a specimen that cannot be analyzed by a laboratory, or a test that is declared invalid by a Medical Review Officer (MRO). For instance, a urine specimen that is rejected by the laboratory is a canceled test. A canceled test is different from a verified positive or negative test. It is also different from the behavior that constitutes a refusal to submit; for a test to be canceled the employee must be ready to submit to a test.

5. *Certification.* This definition describes the statement that must be executed by the recipient.

6. *Chain-of-custody.* This definition refers to the procedures specified in part 40 for the handling of a urine sample. These procedures are designed to protect the integrity of the test and the rights of the employee by ensuring that a particular employee's specimen is sent to a particular laboratory without any intervening steps or opportunity for tampering with the sample.

7. *Consortium.* This definition describes an arrangement in which employers place their safety-sensitive employees in a pool with the safety-sensitive employees of other employers. Any employer subject to any DOT agency anti-drug regulation may join a consortium for the purpose of complying with the rule. It may be particularly advantageous for smaller entities to join a consortium and thereby limit costs and administrative burdens.

8. *Contractor.* This definition covers a broad range of arrangements between an FTA recipient and those carrying out services for it and includes not only written and oral commitments in which both parties agree to specific terms and conditions but informal arrangements as well. An informal arrangement essentially is any ongoing relationship between two parties. Hence, repeatedly doing business with another entity would come within the meaning of a contractual arrangement under the rule.

9. *Covered employee.* This definition describes who is subject to the rule. Only safety-sensitive employees that work for a recipient or any entity performing a mass transit function on behalf of a recipient are covered by the rule, except for contract mechanics for small operators, which are not covered.

10. *DOT.* The abbreviation DOT stands for the United States Department of Transportation.

11. *DOT agency.* DOT contains several operating agencies, five of which issued anti-drug rules in 1988. Those agencies are: FHWA (49 CFR part 382), FRA (49 CFR part 219), FAA (14 CFR part 121, appendix J), Coast Guard (46 CFR parts 4 and 16), and RSPA (49 CFR part 199).

12. *Employer.* This definition applies to entities that must implement an anti-drug rule. It includes recipients and other entities that provide mass transit service or perform a safety-sensitive function for a recipient. It includes subrecipients, operators, contractors, and consortia.

13. *FTA.* FTA is the abbreviation for the Federal Transit Administration.

14. *Large operator.* A large operator is a transit provider primarily operating in an area of 200,000 or more in population.

15. *Medical Review Officer.* A medical review officer is a medical doctor who not only has knowledge of substance abuse disorders, but who also has been trained to interpret and evaluate laboratory test results in conjunction with an employee's medical history. A medical review officer verifies a positive test result by reviewing a laboratory report and an employee's unique medical history to determine whether the result was caused by the use of prohibited drugs or by an employee's medical condition.

16. *Prohibited drug.* This definition lists the drugs listed in section 102(6) of the Controlled Substances Act that have been determined by the Secretary as being a risk to public safety: marijuana, opiates, amphetamines, cocaine, or phencyclidine.

17. *Railroad.* This definition is from the Railroad Safety Act of 1970 and is used in the rule to distinguish FTA's jurisdiction from FRA's. Basically, FRA has jurisdiction over any form of transportation that run on rails and is connected to the general railroad system. FTA thus has jurisdiction over all self-contained forms of mass transportation that run on rails, so long as those systems receive Federal funding from the FTA under sections 3, 9, or 18 of the FT Act or section 103(e)(4) of title 23 of the U.S. Code.

18. *Recipient.* This definition, based on the Act, defines a recipient as an entity receiving Federal financial assistance directly from the FTA under section 3, 9, or 18 of the FT Act or section 103(e)(4) of title 23 of the U.S. Code.

19. *Refuse to submit (to a drug test).* This definition describes the behavior that constitutes a refusal to submit to a drug test, that is, the refusal to produce a specimen.

20. Safety-sensitive function. This definition determines which categories of employees are subject to the rule. Because each recipient uses its own terminology, we have decided to define safety-sensitive based on the function performed instead of listing specific job categories. Each employer must decide for itself whether a particular employee performs any of the functions listed in this definition.

The definition lists five categories of safety-sensitive functions. The list itself is exclusive, which means that either an employee performs a safety-sensitive function listed in a category or she does not. An employer may not add any category to the list unless it wishes to test those additional employees separately under its own authority.

The first category is operating a revenue service vehicle, whether or not the vehicle is in service. In short, an employee who operates a revenue service vehicle for any purpose whatsoever is a safety-sensitive employee and is subject to the rule.

The second category is operating a nonrevenue service vehicle when required to be operated by a holder of a CDL.

The third category is controlling dispatch or movement of a revenue service vehicle or equipment used in revenue service.

The fourth category is maintaining a revenue service vehicle unless the recipient receives section 18 funding and contracts out such services. Maintaining a revenue service vehicle includes any act which repairs, provides upkeep to a vehicle, or any other process which keeps the vehicle operational. It does not include cleaning either the interior or the exterior of the vehicle or transit facility. This category specifically excludes only the employees of a contractor or other entity who maintains revenue service vehicles for section 18 recipients. Hence, all other employees who maintain revenue service vehicles whether by contract or otherwise are safety-sensitive employees.

The fifth category is carrying a firearm for security purposes. A security guard who does not carry a firearm is excluded from this category, and is not a safety-sensitive employee.

We note that supervisors are included in this definition so long as the supervisor performs or the supervisor's job description includes the performance of any function listed in categories 1 through 5.

21. Small operator. A small operator is a recipient operating primarily in an area of less than 200,000 in population.

22. Substance abuse professional. This definition establishes the requirements for anyone who evaluates employees subject to drug testing under this part. The SAP must be knowledgeable about and have clinical experience in the diagnosis and treatment of both drug and alcohol-related disorders. The SAP must also be a licensed physician, either a Medical Doctor or Doctor of Osteopathy, or a licensed or certified psychologist, social worker, employee assistance professional, or addiction counselor who is certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission.

23. Vehicle. This definition lists types of vehicles used in mass transportation, or which may be involved in accidents with such vehicles. Because mass transit encompasses travel by bus, van, ferry boat, and rail, the list is meant to be very broad, covering every type of conveyance used to provide mass transit (including such things as people movers and inclines). The term "mass transit vehicle" is used to distinguish vehicles actually used for transit purposes from those used by the general public.

24. Verified negative drug test result. This definition explains that, if a medical review officer determines there is no evidence of prohibited drugs in an employee's urine sample, the drug test result shall be declared negative.

25. Verified positive drug test result. This definition explains that, if a medical review officer determines there is evidence of prohibited drugs in an employee's urine sample, the drug test result shall be declared positive.

E. Preemption of State and Local Laws. (§ 653.9)

The Act provides that this rule preempts any inconsistent State or local law, ordinance, rule, regulation, standard, or order.

Consistent with long-standing Department-wide interpretation of this type of preemption language, the regulation specifies that "inconsistent with" means that the regulation:

(1) Preempts a State or local requirement if compliance with the local requirement and the FTA regulation is not possible; or

(2) Preempts a State or local requirement if compliance with the local requirement is an obstacle to accomplishing the provisions of the FTA regulation.

On the other hand, neither the statute nor the regulation preempts State criminal laws that impose sanctions for reckless conduct.

F. Other Requirements Imposed by an Employer. (§ 653.11)

An employer may impose other requirements in addition to those imposed by this rule if those additional requirements do not conflict or interfere with the requirements of this rule. For example, an employer may require a supervisor to be trained for four hours instead of one, or an employer may provide annual training for both supervisors and employees. An employer may also require an employee to provide another urine sample in a separate void and may then test that sample for drugs other than the five prohibited drugs. Under the rule, when an employer imposes additional requirements the employer must advise the employee that the requirements are not pursuant to this regulation.

G. Starting Date for Drug Testing Programs. (§ 653.13)

This section states the implementation date for large operators, States, and small operators.

Subpart B—Program Requirements

This subpart describes the four elements of the anti-drug program each employer must implement to be in compliance with this part. An employer must: develop and disseminate a policy statement; train and educate employees about the consequences of prohibited drug use; require testing under five different circumstances; and provide an opportunity for the identification and treatment of employees needing assistance.

A. Requirement To Establish an Anti-drug Program. (§ 653.21)

This section requires an employer to establish an anti-drug program to deter and detect the use of prohibited drugs, consisting of educating and training about drug usage and urine testing for prohibited drugs. The anti-drug program must comply with the requirements imposed by the rule.

B. Required Elements of an Anti-drug Program. (§ 653.23)

This section includes a checklist of the main requirements of the anti-drug program and cross references those provisions which address specific requirements.

C. Policy Statement Contents. (§ 653.25)

The rule requires an employer to make available to every safety-sensitive employee a policy statement describing the employer's anti-drug testing program. The policy must include the following information:

1. Specific categories of employees subject to testing.
2. Where to go for more information about the program.
3. When and why an employee will be tested.
4. The consequences of a verified positive drug test result.

5. Program elements in addition to those required by the FTA regulation.

The FTA expects each employer to describe the consequences to a covered employee of his verified positive drug test result, which must include removal of the employee from his safety-sensitive position and evaluation and possible referral for treatment. In addition, at the employer's discretion the policy statement could describe funding arrangements for treatment. The policy must indicate whether an employer would suspend or terminate a covered employee who has a verified positive drug test result, and the circumstances under which such actions will be taken.

The rule does not mandate rehabilitation for a covered employee, but only requires that an employee be evaluated by an SAP to determine whether the employee has a problem with prohibited drug use. If treatment for a covered employee is deemed necessary, the rule does not require the employer to pay for it. Any decision to provide treatment, and who should pay for it, is made at the local level.

This position on treatment is consistent with congressional debate on the topic. Both Senators Danforth and Hollings clarified this point by stating:

DOT must issue regulations. . . providing for the opportunity for treatment of employees in need of assistance in resolving problems with alcohol or drug use. My understanding is that this does not mandate that rehabilitation be provided but does encourage companies to make such programs available. The legislation does not discuss who pays for treatment, wages during this period, or rights of reinstatement. 137 Cong. Rec. S14770 (daily ed. Oct. 16, 1991) (Statement of Sen. Danforth)

The Senator's understanding is correct. Such arrangement could be left to negotiation between the employer and employee, either through individual arrangement or collective bargaining, as appropriate. . . . 137 Cong. Rec. S14770 (daily ed. Oct. 16, 1991) (Statement of Sen. Hollings).

D. Requirement to Disseminate Policy. (§ 653.27)

This section requires an employer to disseminate its policy statement required by the rule. An employer must notify each covered employee in writing, as well as employee organizations,

E. Education and Training Programs. (§ 653.29)

This section requires an employer to establish an education and training program. In the educational program, which must be provided to covered employees as well as supervisors, an employer must distribute educational materials, including the employer's anti-drug policy statement. The rule also requires the employer to provide a hotline telephone number of a community service organization that deals with drug abuse problems, if such a number is available.

The training component consists of two programs. For all covered employees the training program must be at least 60 minutes in duration, and address certain problems associated with using prohibited drugs. The training program must cover the ramifications of drug use on personal health, safety, and the work environment, and include information on the signs and symptoms that may indicate prohibited drug use.

In addition, for supervisors who may make reasonable suspicion determinations, employers must provide a training program of at least 60 minutes. This training must focus on the physical, behavioral, and performance indicators of drug use.

An employer may add the FTA drug program training to the FTA alcohol training required under the alcohol final rule, published elsewhere in today's Federal Register. An employer may provide any additional training it deems necessary.

F. Types of Drug Tests. (§ 653.31)

This section specifies the different tests the employer must conduct: pre-employment (including transfer to a safety-sensitive position); post-accident (fatal and nonfatal); reasonable suspicion, random, return to duty, and follow-up.

It also specifies the five prohibited drugs: marijuana, cocaine, opiates, amphetamines, and phencyclidine.

G. Notice Requirement. (§ 653.33')

This section requires an employer to notify an employee that the employee is being tested under Federal law and that the employee must provide a urine sample that will be tested for the five prohibited drugs. In this regard, the custody form that each employer signs when a test is administered can satisfy this notice requirement.

This section specifically bars an employer from misrepresenting a test conducted under its own authority as a test mandated by Federal law.

H. Action When Employee Has a Verified Positive Drug Test Result. (§ 653.35)

This section addresses two situations, when an employee has a verified positive drug test result, or has refused to submit to a test. In either case, the employer must remove the safety-sensitive employee from his/her position as soon as practicable after being notified of the result. In both instances, the employer must ensure that the employee is assessed under the provisions of section 653.37, which require that the employee be evaluated by an SAP.

Marine transit operators have additional responsibilities. Consistent with 46 CFR 16.201(c), an employer or prospective employer of an individual holding a license, certificate of registry, or merchant mariner's document who has a verified positive drug test result must report the test result to the nearest Coast Guard Officer in Charge, Marine Inspection (OCMI).

I. Referral, Evaluation and Treatment. (§ 653.37)

This section requires an employer to advise an employee who has a verified positive drug test result of the resources available in resolving problems associated with drug misuse. The information provided by the employer shall include the names, addresses and telephone numbers of substance abuse professionals, and counseling and treatment programs.

Such an employee must be evaluated by a substance abuse professional to determine whether the employee needs help in resolving problems associated with drug misuse. The SAP then determines what kind of help the employee needs. Any such employee must take a return to duty drug test with a verified negative result before he or she may be allowed to perform a safety sensitive function again.

The employee must follow the course of treatment prescribed by the SAP. To return to duty, the employee must be evaluated by a SAP to determine that the employee has properly followed the course of prescribed treatment and is able to return to work.

The employee then must take a return-to-duty test with a verified negative result and is then subject to follow-up testing, which occurs unpredictably for up to 60 months following return to duty. In any event, the employee must take at least six follow up tests with verified negative results during the first twelve months after returning to duty. The SAP then determines how many follow up tests

should be administered over the remaining 48 months.

In addition, the SAP may recommend that the employee also be subject to return to duty and follow-up testing for alcohol misuse.

Such an employee remains separately subject to random drug testing.

An employer is not required to provide applicants with an opportunity for referral, evaluation, and treatment.

Subpart C—Types of Drug Tests

A. Pre-employment Testing. (§ 653.41)

This section prohibits an employer from hiring an applicant for a safety-sensitive function unless the applicant takes a drug test with a verified negative result administered in accordance with this regulation. This section also requires that an employee who transfers from a nonsafety-sensitive position to a safety-sensitive position to be tested before he or she actually begins performing a safety-sensitive function for the first time.

For marine employers, 46 CFR 16.210(a) prohibits hiring or giving a commitment of employment to an individual unless the individual takes a drug test with a verified negative result or meets a stated pre-employment exemption under 46 CFR 16.210(b). Marine employers that also are FTA recipients, however, must in every instance require an applicant to take a drug test with a verified negative result before they may be hired.

B. Reasonable Suspicion Testing. (§ 653.43)

This section requires an employer to test a covered employee for prohibited drug use if the employer has reasonable suspicion to believe that the covered employee has used prohibited drugs. The reasonable suspicion must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, or speech of the covered employee, which are characteristic of prohibited drug use.

The rule requires the decision to be made by a supervisor trained in detecting the signs and symptoms of prohibited drug use.

C. Post-accident Testing. (§ 653.45)

This section requires a test after an accident has occurred, and establishes two categories of accidents, fatal and nonfatal. Non-fatal accidents are treated differently depending on the type of transit vehicle involved. For a more complete description of the ways in which different kinds of accidents are treated, please refer to the discussion of post-accident testing in the portion of

the preamble that responds to comments.

The rule requires an employer to test the appropriate covered employees as soon as possible, but within 32 hours, consistent with other DOT agency existing drug testing rules.

The rule also requires an employer to require an employee to remain readily available for testing; if the employee does not do so, the employer can treat such behavior as refusing to submit to a drug test. Remaining readily available means that the employer knows the whereabouts of the employee and must conduct the test as soon as practicable but within 32 hours of the accident.

This section allows an employee to seek medical attention, assist injured individuals, or obtain assistance in dealing with the accident, if necessary, before being tested for prohibited drugs.

D. Random Testing. (§ 653.47)

The rule requires an employer to randomly test covered employees for the use of prohibited drugs. The testing must truly be random, which means that it is random with respect to the person tested and the predictability of the actual administration of the test.

An employer cannot use an employee's name in a random selection pool. Rather, an employer must identify each covered employee by a unique number, such as a social security or a payroll identification number, which is entered into a pool from which the selection is made. Each covered employee must have an equal chance of being tested. Once a covered employee is selected and tested, their identification number is reentered into the pool so that they will have an equal chance of being tested the next time the employer conducts random testing.

An employer must test randomly throughout the calendar year. Testing must be unannounced and occur on a reasonable basis throughout the entire calendar year. Random tests must be conducted in an unpredictable fashion. For example, an employer may not conduct random tests only on a Monday or only at the beginning of a shift. Further, once an employee is notified of his selection for a random test, he must report (or be escorted) immediately to the collection site.

The random drug testing rate is set at 50 percent. For compliance purposes, it is important to note that in calculating its random testing results an employer must include adulterated urine samples and refusals to submit to a test as verified positive test results.

E. Return to Duty Testing. (§ 653.49)

Return to duty testing refers to the test that employees who have verified positive drug test results or refuse to submit to a drug test.

In addition, because of the prevalence of combined drug and alcohol misuse, an employer may, based on the recommendations of the substance abuse professional, also subject an employee who previously had a verified positive drug test result under the FTA anti-drug rule to a return to duty alcohol test.

F. Follow-up Testing. (§ 653.51)

Upon taking a return to duty test with a verified negative result, an employee is subject to follow-up testing for up to 60 months. During the first 12 months the employee is subject to a minimum of 6 follow-up drug tests which must be unannounced and conducted reasonably throughout the 12 months.

After those 12 months, the substance abuse professional determines whether the employee should be subject to follow-up testing for the remaining 48 months. Because many individuals abuse more than one substance at a time, an employer may, based on the recommendations of the SAP, subject an employee who previously had a verified positive drug test result for prohibited drugs under this rule to follow-up testing for the misuse of alcohol. An employer may also subject an employee who previously tested at 0.04 or greater on an alcohol test under part 654 to follow-up drug testing for the use of prohibited drugs.

It is important to note that an employee subject to follow-up testing remains separately subject to random drug testing under this rule.

Subpart D—Drug Testing Procedures

This subpart contains a drug testing procedure required by the Act in addition to those required in 49 CFR part 40.

A. Compliance With Testing Procedures Requirements. (§ 653.61)

This section requires an employee to use the testing procedures in 49 CFR Part 40 unless expressly provided otherwise in this part. This Part 653 contains the additional testing requirement mandated by the Act, namely, the evaluation by an SAP.

B. Substance Abuse Professional. (§ 653.63)

This section explains the role of the substance abuse professional. In relation to a covered employee, a substance abuse professional is neither a counselor nor a treating professional. Rather, an

SAP evaluates an employee who either has a verified positive drug test result or refused to be tested to determine whether the covered employee needs help resolving a problem with prohibited drug use. The SAP then makes certain recommendations to the employee, which the employee must follow. Before returning to duty, the employee is reevaluated by an SAP to determine whether the employee has followed the SAP's recommendations. The SAP then determines whether the employee is ready to return to her safety-sensitive function. The SAP also determines the number of follow-up tests the employee should be subject to in addition to the six mandatory follow-up tests in the first 12 months after the employee's return to duty.

The rule discusses several employment options concerning the substance abuse professional. Who pays for the services of the substance abuse professional, however, is determined at the local level.

This section prohibits, in some circumstances, a substance abuse professional from treating an employee after evaluation and determination that the employee needs help. This section, however, allows an evaluating SAP also to treat an employee when the SAP is an employee of or under contract to an employer, the SAP is the only source of appropriate therapeutic treatment provided under the employee's health plan or reasonably accessible to the employee, or the SAP works for a public agency such as a State, county, or municipality.

Subpart E—Administrative Requirements

A. Retention of Records. (§ 653.71)

Section 653.71 explains which records relating to the drug testing program must be retained and for how long. The rule provides for three separate record retention periods for different types of records—five years, three years, and one year. Each employer must maintain for five years records of covered employees' verified positive drug test results, documentation of refusals to take a drug test, and covered employee referrals to the SAP. Collection process and employee training documents must be retained for two years, while records of negative test results must be retained for one year.

B. Reporting of Results in a Management Information System. (§ 653.73)

The reporting requirements required in section 653.73 are part of a Department-wide effort to standardize

reporting for drug testing by means of a Management Information System (MIS). The data collected will be used by FTA and DOT to identify trends and to assess the success or failure of the agency's anti-drug rule.

The data elements were selected to provide information on the scope of the program, the prevalence of drug use in mass transportation, the implementation of the program and its related costs, and the deterrent effect of the rule over time. Appendix B must be used in reporting both verified positive and negative drug test results; Appendix C must be used by employers who have no verified positive drug results to report. FTA does intend to combine the drug and alcohol annual reporting forms within two to three years after the implementation date.

Recipients and subrecipients must submit to FTA their own annual reports as well as an annual report from each of their contractors with covered employees. Each report submitted must cover a calendar year. The closing date for data is December 31 and the report is due at FTA by March 15 of the following year.

C. Access to Facilities and Records. (§ 653.75)

Paragraph (a) of this section precludes an employer, in most circumstances, from releasing information contained in records required to be maintained under this rule. Examples of such records include any document generated as a result of a refusal to take a drug test or a reasonable suspicion determination. An employer, however, may release information when required to do so by law or this rule, or if expressly authorized.

Paragraph (b) provides that the employer must provide the employee copies of records relating to the employee's alcohol tests or pertaining to the employee's prohibited use of drugs. Once the employee has submitted his request in writing, the employer must promptly provide the records to him. The employer may charge for reproducing the records but only for copies of those records specifically requested.

Paragraph (c) requires the employer to allow certain governmental entities to have access to any facility used to comply with this rule. The rule provides that the Secretary of Transportation or representatives from any other DOT agency shall have access. In addition, the rule requires an employer to allow the State agency designated by the governor to oversee rail fixed guideway systems to also have access to its facilities to properly oversee the safety

of a rail fixed guideway system as required by section 28 of the FT Act. We note here that the State oversight of rail fixed guideway system Notice of Proposed Rulemaking published in the Federal Register on December 9, 1993 at 58 FR 64856 contains FTA's proposal for the State oversight agency.

Paragraph (d) requires an employer to give certain governmental entities copies of test results and any other information pertaining to the employer's anti-drug program. Those governmental entities are the same as those specified in subsection (c).

Paragraph (e) requires an employer to disclose information about the employer's administration of a post-accident drug test to the National Transportation Safety Board (NTSB) when it investigates an accident.

Paragraph (f) provides that the employer must give copies of certain records to a subsequent employer if the employee makes such a request in writing. The employer may disclose only that information specifically authorized by the employee in her written request.

Paragraph (g) requires the employer to disclose certain information when requested to do so by the employee or a decisionmaker in a lawsuit, grievance, or other proceeding when such a proceeding has been initiated by the employee and arises from the results of a drug test administered under this part. This provision does not cover any proceeding initiated by a third party and is limited to employment actions such as worker's compensation or unemployment compensation which are initiated by the employee.

Subsection (h) provides that the employer must release information to any individual when requested to do so by the employee in writing. The employer may release only that information specifically authorized by the employee.

Subpart F—Certifying Compliance

This subpart establishes the certification requirements for recipients of FTA funding under sections 3, 9, or 18 of the FT Act or section 103(e)(4) of title 23 of the U.S. Code.

A. Compliance a Condition of FTA Financial Assistance. (§ 653.81)

This section mandates the withholding of Federal funds from a recipient of FTA funding under sections 3, 9, or 18 of the FT Act, or section 103(e)(4) of title 23 of the U.S. Code, if it is not in compliance with the rule. To be in compliance with the rule, the recipient either must implement the requirements of the rule or require their

implementation by subrecipients, operators, contractors, employers, or any other entity performing a mass transit function on behalf of the recipient.

It is important to note that any misrepresentation or false statement to FTA is a criminal violation under section 1001 of title 18 of the United States Code.

B. Requirement to Certify Compliance. (§ 653.83)

This section requires a recipient to certify that the requirements of the rule have been met. We emphasize that the direct recipient of FTA funds makes this certification to FTA.

The certifications are required annually, with large operators submitting their certification before January 1, 1995 and small operators and States submitting their certifications before January 1, 1996. States will certify on behalf of subrecipients and their contractors.

The certification itself must comply with the sample certification provided in Appendix A to this part, be authorized by the recipient's governing board or other authorizing official, and be signed by a party specifically authorized to do so.

IV. Americans With Disabilities Act

Title I of the American With Disabilities Act of 1990 (ADA) prohibits discrimination on the basis of disability in employment. A basic premise of Title I is that a person with a disability must be provided a reasonable accommodation to work. It is possible that some covered workers will be considered persons with disabilities for purposes of protections under the ADA. For a more complete discussion of this issue please see the DOT-wide Preamble preceding this FTA document in today's Federal Register.

V. Economic Analysis

The Federal Transit Administration (FTA) has evaluated the industry-wide costs and benefits of the rule, Prevention of Prohibited Drug Use in Transit Operations. This rule will require personnel who perform safety-sensitive functions to be covered by a formal program to control drug use in mass transit operations. This rule will cover FTA recipients and combine education and testing in a comprehensive anti-drug program. Five types of drug tests will be administered:

- Pre-Employment
- Reasonable Suspicion
- Post-Accident
- Random
- Return to Duty/Follow-up

Transit agencies will be required to report the number of tests given, the number of failures-to-pass and other attributes of their program to the FTA and to certify compliance with this regulation annually.

Annual costs of the drug testing program range from \$25 to \$32 million per year. Total costs over 10 years are \$299 million. Random tests are the most costly.

Annual benefits range from \$11 to \$103 million per year. Total benefits over 10 years are \$867 million.

A major premise in calculating both costs and benefits is the assumption that all transit systems will start from scratch or "ground zero" when implementing drug testing programs as a result of this regulation. Estimates in this analysis are based on (1) the 1989 and 1991 National Urban Mass Transportation Statistics Section 15 Annual Reports, (2) the 1991 report, Substance Abuse in the Transit Industry, prepared for the FTA by Booz, Allen & Hamilton, Inc., (3) data provided by the Substance Abuse and Mental Health Service Administration, and (4) information from other agencies, individuals, and organizations knowledgeable about drug abuse and chemical testing in the United States.

VI. Regulatory Process Matters

A. Executive Order 12688

The FTA has evaluated the industry costs and benefits of the drug testing rule, and has determined that this rulemaking is a significant rule under Executive Order 12688 because the required anti-drug program raises novel policy issues and will materially affect public safety as well as State and local governments. This rule will not, however, have an annual impact on the economy of \$100 million or more.

B. Departmental Significance

This rule is a "significant regulation" as defined by the Department's Regulatory Policies and Procedures, because it involves an important departmental policy and will probably generate a great deal of public interest. The purpose of this rule is to make mass transit systems safer by ensuring that safety-sensitive employees do not use prohibited substances.

C. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, the FTA has evaluated the effects of this rule on small entities. Based on the evaluation, the FTA hereby certifies that this action will have a significant economic impact on a substantial number of small entities. This rule has

some provisions designed to mitigate burdens on small entities which are discussed in the regulatory evaluation.

This rule applies to public recipients of Federal Transit funds, 274 of which are large and 1314 of which are small. It is estimated that it will cost the small transit systems \$86 million to implement this drug rule, with total benefits to them of \$267 million over the 10 year analysis.

D. Paperwork Reduction Act

This rule includes information collection requirements subject to the Paperwork Reduction Act. A request for Paperwork Reduction Act approval has been submitted to the Office of Management and Budget in conjunction with this rule. Information collection requirements are not effective until Paperwork Reduction Act clearance has been received.

E. Executive Order 12612

We have reviewed this rule under the requirements of Executive Order 12612 on Federalism. Although the Federal Transit Administration has determined that this rule has significant Federalism implications to warrant a Federalism assessment, this rulemaking is mandated by the Omnibus Transportation Employee Testing Act of 1991 (the Act). In considering the Federalism implications of the rule, FTA has focused on several key provisions of Executive order 12612.

Necessity for action. This rule is mandated by law, which requires comprehensive drug and alcohol testing programs of recipients of Federal transit funding. Congress responded to specific accidents in mass transportation by mandating these rules to ensure the safety of the transit-riding public.

Consultation with State and local governments. FTA provides financial assistance to mass transportation systems throughout the country by means of grants to States and public bodies. Because this rule will affect those States and local entities, we published a Notice of Proposed Rulemaking (NPRM) in the Federal Register to solicit the views of the affected entities, including States and local governments, and held three public hearings in conjunction with the NPRM. In short, we actively sought the views and comments of the affected States and localities.

Need for Federal action. This rule responds to a Congressional mandate that the safety of the transit riding public requires comprehensive anti-drug and alcohol testing programs.

Authority. The statutory authority for this final rule is the Act, mentioned

above and discussed elsewhere in the preamble.

Preemption. This rule preempts any State or local law, order, or regulation to the contrary, as discussed elsewhere in the preamble. Because compliance with the rule is a condition of Federal financial assistance, State and local governments have the option of not receiving the Federal funds if they do not choose to comply with this rule. We have not preempted Indian tribal law.

F. National Environmental Policy Act.

The agency has determined that this regulation has no environmental implications. Its purpose is to regulate the behavior of those safety-sensitive employees who work in the transit industry and will have no appreciable effect on the quality of the environment.

G. Energy Impact Implications.

This regulation does not affect the use of energy because it regulates the behavior of those safety-sensitive employees who work in the transit industry.

List of Subjects in 49 CFR Part 653

Drug testing, Grant programs—transportation, Mass transportation, Reporting and recordkeeping requirements, Safety, Transportation.

Accordingly, for the reasons cited above, the agency amends title 49 by revising part 653, as set forth below:

Part 653—Prevention of Prohibited Drug Use in Transit Operations

Subpart A—General

- 653.1 Overview.
- 653.3 Purpose.
- 653.5 Applicability.
- 653.7 Definitions.
- 653.9 Preemption of State and local laws.
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Authority: Sec. 6, Pub. L. 102-143, 105 Stat. 917; 49 CFR 1.51

Subpart A—General

§ 653.1 Overview.

(a) This part describes the anti-drug program to be implemented by a recipient of certain funding from the Federal Transit Administration.

(b) The part includes six subparts. Subpart A covers the general requirements of the FTA anti-drug program. Subpart B specifies the basic requirements of each employer's anti-drug program, including the types of tests to be conducted, and the elements required to be in each employer's drug testing program. Subpart C describes the different types of drug tests to be conducted. Subpart D describes a new drug testing procedural requirement mandated by the Act. Subpart E contains administrative matters such as reports and recordkeeping requirements. Subpart F specifies how a recipient certifies compliance with the rule.

§ 653.3 Purpose.

The purpose of this part is to require a recipient to implement an anti-drug program to deter and detect the use of prohibited drugs by covered employees.

§ 653.5 Applicability.

(a) Except as specifically excluded in paragraph (b) of this section, this part applies to a recipient under—

- (1) Section 3, 9, or 18 of the Federal Transit Act, as amended (FTA Act); or
- (2) Section 103(e)(4) of title 23 of the United States Code.

(b) A recipient operating a railroad regulated by the Federal Railroad Administration (FRA) shall follow 49

CFR part 219 and § 653.83 of this part for its railroad operations, and this part for its non-railroad operations, if any.

(Note: For recipients who operate marine vessels, see also Coast Guard regulations at 33 CFR part 95 and 46 CFR parts 4, 5, and 6.)

§ 653.7 Definitions.

As used in this part—

Accident means an occurrence associated with the operation of a vehicle, if as a result—

- (1) An individual dies;
- (2) An individual suffers a bodily injury and immediately receives medical treatment away from the scene of the accident;

(3) With respect to an occurrence in which the mass transit vehicle involved is a bus, electric bus, van, or automobile, one or more vehicles incurs disabling damage as the result of the occurrence and is transported away from the scene by a tow truck or other vehicle. For purposes of this definition, *disabling damage* means damage which precludes departure of any vehicle from the scene of the occurrence in its usual manner in daylight after simple repairs. Disabling damage includes damage to vehicles that could have been operated but would have been further damaged if so operated, but does not include damage which can be remedied temporarily at the scene of the occurrence without special tools or parts, tire disablement without other damage even if no spare tire is available, or damage to headlights, taillights, turn signals, horn, or windshield wipers that makes them inoperative.

(4) With respect to an occurrence in which the mass transit vehicle involved is a rail car, trolley car, trolley bus, or vessel, the mass transit vehicle is removed from revenue service.

Administrator means the Administrator of the Federal Transit Administration or the Administrator's designee.

Anti-drug program means a program to detect and deter the use of prohibited drugs as required by this part.

Canceled test means a test that has been declared invalid by a Medical Review Officer. It is neither a verified positive nor a verified negative test, and includes a specimen rejected for testing by a laboratory.

Certification means a recipient's written statement, authorized by the organization's governing board or other authorizing official, that the recipient has complied with the provisions of this part. (See § 653.77 for certification requirements.)

Chain-of-custody means the procedures in part 40 of this title

concerning the handling of a urine specimen.

Consortium means an entity, including a group or association of employers, operators, recipients, subrecipients, or contractors, which provides drug testing as required by this part, or other DOT drug testing rule, and which acts on behalf of the employer.

Contractor means a person or organization that provides a service for a recipient, subrecipient, employer, or operator consistent with a specific understanding or arrangement. The understanding can be a written contract or an informal arrangement that reflects an ongoing relationship between the parties.

Covered employee means a person, including a volunteer, applicant, or transferee, who performs a safety-sensitive function for an entity subject to this part.

DOT means the United States Department of Transportation.

DOT agency means an agency (or "operating administration") of the United States Department of Transportation administering regulations requiring drug testing (see parts 199, 219, 382, and 653 of this title; 14 CFR part 121, Appendix J; 33 CFR part 95; and 46 CFR parts 4 and 16).

Employer means a recipient or other entity that provides mass transportation service or which performs a safety-sensitive function for such recipient or other entity. This term includes subrecipients, operators, and contractors.

FTA means the Federal Transit Administration, an agency of the U.S. Department of Transportation.

Large operator means a recipient or subrecipient primarily operating in an area of 200,000 or more in population.

Medical Review Officer (MRO) means a licensed physician (medical doctor or doctor of osteopathy) responsible for receiving laboratory results generated by an employer's drug testing program who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's confirmed positive test result together with his or her medical history and any other relevant biomedical information.

Prohibited drug means marijuana, cocaine, opiates, amphetamines, or phencyclidine.

Railroad means all forms of non-highway ground transportation that run on rails or electromagnetic guideways, including (1) commuter or other short-haul rail passenger service in a metropolitan or suburban area, as well as any commuter rail service which was operated by the Consolidated Rail

Corporation as of January 1, 1979, and (2) high speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads. Such term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation.

Recipient means an entity receiving Federal financial assistance under section 3, 9, or 18, of the FT Act, or under section 103(e)(4) of title 23 of the United States Code.

Refuse to submit (to a drug test) means that a covered employee fails to provide a urine sample as required by 49 CFR part 40, without a valid medical explanation, after he or she has received notice of the requirement to be tested in accordance with the provisions of this subpart, or engages in conduct that clearly obstructs the testing process.

Safety-sensitive function means any of the following duties:

- (1) Operating a revenue service vehicle, including when not in revenue service;
- (2) Operating a nonrevenue service vehicle, when required to be operated by a holder of a Commercial Driver's License;
- (3) Controlling dispatch or movement of a revenue service vehicle;
- (4) Maintaining a revenue service vehicle or equipment used in revenue service, unless the recipient receives section 18 funding and contracts out such services; or
- (5) Carrying a firearm for security purposes.

Small operator means a recipient or subrecipient primarily operating in an area of less than 200,000 in population.

Substance abuse professional (SAP) means a licensed physician (Medical Doctor or Doctor of Osteopathy), or a licensed or certified psychologist, social worker, employee assistance professional, or addiction counselor (certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission), with knowledge of and clinical experience in the diagnosis and treatment of drug and alcohol-related disorders.

Vehicle means a bus, electric bus, van, automobile, rail car, trolley car, trolley bus, or vessel. A **mass transit vehicle** is a vehicle used for mass transportation.

Verified negative (drug test result) means a drug test result reviewed by a medical review officer and determined to have no evidence of prohibited drug use.

Verified positive (drug test result) means a drug test result reviewed by a

medical review officer and determined to have evidence of prohibited drug use.

§ 653.9 Preemption of State and local laws.

(a) Except as provided in paragraph (b) of this section, this part preempts any State or local law, rule, regulation, or order to the extent that:

- (1) Compliance with both the State or local requirement and any requirement in this part is not possible; or
- (2) Compliance with the State or local requirement is an obstacle to the accomplishment and execution of any requirement in this part.

(b) This part shall not be construed to preempt provisions of State criminal law that impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees or employers or to the general public.

§ 653.11 Other requirements imposed by an employer.

An employer may not impose requirements that are inconsistent with, contrary to, or frustrate the provisions of this part.

§ 653.13 Starting date for drug testing programs.

(a) **Large employers.** Each recipient operating in an area of 200,000 or more in population on March 17, 1994 shall implement the requirements of this part beginning on January 1, 1995.

(b) **Small employers.** Each recipient operating in an area of 200,000 or less in population on March 17, 1994 shall implement the requirements of this part beginning on January 1, 1996.

(c) An employer shall have an anti-drug program that conforms to this part by January 1, 1996, or by the date the employer begins operations, whichever is later.

Subpart B—Program Requirements

§ 653.21 Requirement to establish an anti-drug program.

Each employer shall establish an anti-drug program consistent with the requirements of this part.

§ 653.23 Required elements of an anti-drug testing program.

An anti-drug program shall include the following:

- (a) A statement describing the employer's policy on prohibited drug use in the workplace, including the consequences associated with prohibited drug use. This policy statement shall include all of the elements specified in § 653.25. Each employer shall disseminate the policy consistent with the provisions of § 653.27.

(b) An education and training program which meets the requirements of § 653.29.

(c) A testing program, as described in § 653.31 that meets the requirements of this part and part 40 of this title.

(d) Procedures for assessing the covered employee who has a verified positive drug test result as described in § 653.37.

§ 653.25 Policy statement contents.

The policy statement shall be adopted by the local governing board of the employer or operator, be made available to each covered employee, and shall include, at a minimum, detailed discussion of:

(a) The identity of the person designated by the employer to answer employee questions about the anti-drug program.

(b) The categories of employees who are subject to the provisions of this part.

(c) Specific information concerning the behavior that is prohibited by this part.

(d) The specific circumstances under which a covered employee will be tested for prohibited drugs under the provisions of this part.

(e) The procedures that will be used to test for the presence of drugs, protect the employee and the integrity of the drug testing process, safeguard the validity of the test results, and ensure the test results are attributed to the correct covered employee.

(f) The requirement that a covered employee submit to drug testing administered in accordance with this part.

(g) A description of the kind of behavior that constitutes a refusal to take a drug test and a statement that such a refusal constitutes a verified positive drug test result.

(h) The consequences for a covered employee who has a verified positive drug test result or refuses to submit to a drug test under this part, including the mandatory requirements that the covered employee be removed immediately from his or her safety-sensitive function and be evaluated by a substance abuse professional.

(i) If the employer implements elements of an anti-drug program that are in addition to this part (See § 653.31), the employer shall give each covered employee specific information concerning which provisions are mandated by this part and which are not.

§ 653.27 Requirement to disseminate policy.

Each employer shall provide written notice to every covered employee and to

representatives of employee organizations of the employer's anti-drug policies and procedures.

§ 653.29 Education and training programs.

Each employer shall establish an employee education and training program for all covered employees, including:

(a) *Education.* The education component shall include display and distribution to every covered employee of: informational material and a community service hot-line telephone number for employee assistance, if available.

(b) *Training—(1) Covered employees.* Covered employees must receive at least 60 minutes of training on the effects and consequences of prohibited drug use on personal health, safety, and the work environment, and on the signs and symptoms which may indicate prohibited drug use.

(2) *Supervisors.* Supervisors who may make reasonable suspicion determinations shall receive at least 60 minutes of training on the physical, behavioral, and performance indicators of probable drug use.

§ 653.31 Drug testing.

(a) An employer shall establish a program which provides for testing for prohibited drugs and drug metabolites in the following circumstances: pre-employment, post-accident, reasonable suspicion, random, and return to duty/follow-up, as described in detail in each case in subpart C of this part.

(b) When administering a drug test, an employer shall ensure that the following drugs are tested for:

- (1) Marijuana;
- (2) Cocaine;
- (3) Opiates;
- (4) Amphetamines; and
- (5) Phencyclidine.

§ 653.33 Notice requirement.

Before performing a drug test under this part, each employer shall notify a covered employee that the drug test is required by this part. No employer shall falsely represent that a test is administered under this part.

§ 653.35 Action when employee has a verified positive drug test result.

(a) As soon as practicable after receiving notice from the medical review officer (MRO) that an employee has a verified positive drug test result, or if an employee refuses to submit to a drug test, the employer shall require that a covered employee cease performing a safety-sensitive function.

(b) Before allowing the covered employee to resume performing a safety-sensitive function, the employer shall

ensure that the covered employee meets the requirements of this part for returning to duty, including taking a return to duty drug test with a verified negative result, as required by § 653.49.

§ 653.37 Referral, evaluation, and treatment.

(a) A covered employee who has a verified positive drug test result refuses to submit to a drug test under this part shall be advised by the employer of the resources available to the covered employee in evaluating and resolving problems associated with prohibited drug use, including the names, addresses, and telephone numbers of substance abuse professionals and counseling and treatment programs.

(b)(1) The employer shall ensure that each covered employee who has a verified positive drug test result or refuses to take a drug test shall be evaluated by a substance abuse professional who shall determine whether the covered employee is in need of assistance in resolving problems associated with prohibited drug use.

(2) Evaluation and rehabilitation may be provided by the employer, by a substance abuse professional under contract with the employer, or by a substance abuse professional not affiliated with the employer. The choice of substance abuse professional and assignment of costs shall be made in accordance with employer/employee agreements and employer policies.

(3) The employer shall ensure that a substance abuse professional who determines that a covered employee requires assistance in resolving problems with prohibited drug use does not refer the employee to the substance abuse professional's private practice from which the substance abuse professional receives remuneration or to a person or organization from which the substance abuse professional has a financial interest. This paragraph does not prohibit a substance abuse professional from referring an employee for assistance provided through—

(i) A public agency, such as a State, county, or municipality;

(ii) The employer or a person under contract to provide treatment for prohibited drug use problems on behalf of the employer;

(iii) The sole source of therapeutically appropriate treatment under the employee's health insurance program; or

(iv) The sole source of therapeutically appropriate treatment reasonably accessible to the employee.

(c) An employer shall ensure that, before returning to duty to perform a safety-sensitive function, a covered

employee has complied with the referral and evaluation provisions of this part and takes a return to duty drug test with a verified negative result under § 653.49.

(d) The requirements of this section do not apply to applicants.

Subpart C—Types of Drug Testing

§ 653.41 Pre-employment testing.

(a) An employer may not hire an applicant to perform a safety-sensitive function unless the applicant takes a drug test with a verified negative result administered under this part.

(b) An employer may not transfer an employee from a nonsafety-sensitive function to a safety-sensitive function until the employee takes a drug test with a verified negative result administered under this part.

(c) If an applicant or employee drug test is canceled, the employer shall require the employee or applicant to take another pre-employment drug test.

§ 653.43 Reasonable suspicion testing.

(a) An employer shall conduct a drug test when the employer has reasonable suspicion to believe that the covered employee has used a prohibited drug.

(b) An employer's determination that reasonable suspicion exists shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the covered employee. The required observations must be made by a supervisor who is trained in detecting the signs and symptoms of drug use.

(c) An employer shall not permit a direct supervisor of an employee to serve as the collection site person for a drug test of the employee.

§ 653.45 Post-accident testing.

(a)(1) *Fatal accidents.* As soon as practicable following an accident involving the loss of human life, an employer shall test each surviving covered employee on duty in the mass transit vehicle at the time of the accident. The employer shall also test any other covered employee whose performance could have contributed to the accident, as determined by the employer using the best information available at the time of the decision.

(2) *Nonfatal accidents.* (i) As soon as practicable following an accident not involving the loss of human life, in which the mass transit vehicle involved is a bus, electric bus, van, or automobile, the employer shall test each covered employee on duty in the mass transit vehicle at the time of the accident if that employee has received a citation under State or local law for a moving traffic violation arising from the

accident. The employer shall also test any other covered employee whose performance could have contributed to the accident, as determined by the employer using the best information available at the time of the decision.

(ii) As soon as practicable following an accident not involving the loss of human life, in which the mass transit vehicle involved is a rail car, trolley car, trolley bus, or vessel, the employer shall test each covered employee on duty in the mass transit vehicle at the time of the accident unless the employer determines, using the best information available at the time of the decision, that the covered employee's performance can be completely discounted as a contributing factor to the accident. The decision not to administer a test under this paragraph shall be based on the employer's determination, using the best available information at the time of the determination, that the employee's performance could not have contributed to the accident. The employer shall also test any other covered employee whose performance could have contributed to the accident, as determined by the employer using the best information available at the time of the decision.

(b) An employer shall ensure that a covered employee required to be tested under this section is tested as soon as practicable and within 32 hours of the accident. A covered employee who is subject to post-accident testing who fails to remain readily available for such testing, including notifying the employer or the employer representative of his or her location if he or she leaves the scene of the accident prior to submission to such test, may be deemed by the employer to have refused to submit to testing.

(c) Nothing in this section shall be construed to require the delay of necessary medical attention for the injured following an accident or to prohibit a covered employee from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care.

§ 653.47 Random testing.

(a) Each employer shall, at various times, randomly select covered employees for unannounced drug testing. The selection of covered employees shall be made by a scientifically valid method, such as a random-number table or a computer-based random number generator that is matched with covered employees' Social Security numbers, payroll identification numbers, or other comparable identifying numbers.

(b) During each calendar year following the start of the anti-drug program required by this part, the employer shall meet the following conditions:

(1) The dates for administering unannounced testing of randomly-selected covered employees shall be spread reasonably throughout the calendar year; and

(2) The number of covered employees randomly selected for testing during the calendar year shall be equal to a minimum annual percentage rate of 50 percent of the total number of covered employees subject to drug testing under this part.

(c) Each covered employee shall be in a pool from which random selection is made. Each covered employee in the pool shall have an equal chance of selection and shall remain in the pool, whether or not the covered employee is ever tested.

(d) If an employer conducts random testing through a consortium, the number of employees to be tested may be calculated for each individual employer or may be based on the total number of covered employees covered by the consortium who are subject to random drug testing at the same minimum annual percentage rate under this part or any DOT drug testing rule.

§ 653.49 Return to duty testing.

(a) *Return to duty.* An employer shall ensure that, before returning to duty to perform a safety-sensitive function, each covered employee who has refused to submit to a drug test or has a verified positive drug test result—

(1) Has been evaluated by a substance abuse professional to determine whether the covered employee has properly followed the recommendations for action by the substance abuse professional, including participation in any rehabilitation program;

(2) Has taken a return to duty drug test with a verified negative result. If a test is canceled, the employer shall require the employee to take another return to duty drug test.

(3) A substance abuse professional may recommend that the employee be subject to a return to duty alcohol test with a result indicating an alcohol concentration of less than 0.02, to be conducted in accordance with 49 CFR part 40.

(b) *Marine employers.* Marine employers subject to U.S. Coast Guard chemical testing regulations shall ensure that each covered employee who has a verified positive drug test result administered under this part is evaluated by a Medical Review Officer.

§ 653.51 Follow-up testing.

Each employer shall ensure that each covered employee who returns to duty after a required evaluation made under § 653.37 is subject to unannounced follow-up drug testing as provided for in § 653.63(d). The employer may require the employee to take one or more follow-up alcohol tests, with a result indicating an alcohol concentration of less than 0.04, as directed by the SAP, to be performed in accordance with 49 CFR part 40.

Subpart D—Drug Testing Procedures**§ 653.61 Compliance with testing procedures requirements.**

The drug testing procedures of part 40 of this title apply to employers covered by this part, unless expressly provided otherwise in this part.

§ 653.63 Substance abuse professional.

(a) An employer's anti-drug program shall have available the services of a designated substance abuse professional.

(b) The substance abuse professional shall determine whether a covered employee who has refused to submit to a drug test or has a verified positive drug test result is in need of assistance in resolving problems associated with prohibited drug use. The substance abuse professional then recommends a course of action to the employee.

(c) The substance abuse professional shall determine whether a covered employee who has refused to submit to a drug test or has a verified positive drug test result has properly followed the SAP's recommendations.

(d) The substance abuse professional shall determine the frequency and duration of follow-up testing for a covered employee. Such employee shall be required to take a minimum of six follow-up drug tests with verified negative results during the first 12 months after returning to duty. After that period of time, the substance abuse professional may recommend to the employer the frequency and duration of follow-up drug testing, provided that the follow-up testing period ends 60 months after the employee returns to duty. In addition, follow-up testing may include testing for alcohol, as directed by the substance abuse professional, to be performed in accordance with 49 CFR part 40.

Subpart E—Administrative Requirements**§ 653.71 Retention of records.**

(a) *General requirement.* An employer shall maintain records of its anti-drug program as provided in this section. The

records shall be maintained in a secure location with controlled access.

(b) *Period of retention.* In determining compliance with the retention period requirement, each record shall be maintained for the specified period of time, measured from the date of the document's or data's creation. Each employer shall maintain the records in accordance with the following schedule:

(1) *Five years:* Records of covered employee verified positive drug test results, documentation of refusals to take required drug tests, and covered employee referrals to the SAP, and copies of annual MIS reports submitted to FTA.

(2) *Two years:* Records related to the collection process and employee training.

(3) *One year:* Records of negative drug test results.

(c) *Types of records.* The following specific records must be maintained.

(1) Records related to the collection process:

(i) Collection logbooks, if used.
(ii) Documents relating to the random selection process.

(iii) Documents generated in connection with decisions to administer reasonable suspicion drug tests.

(iv) Documents generated in connection with decisions on post-accident drug testing.

(v) MRO documents verifying existence of a medical explanation of the inability of a covered employee to provide an adequate urine sample.

(2) Records related to test results:

(i) The employer's copy of the custody and control form.

(ii) Documents related to the refusal of any covered employee to submit to a drug test required by this part.

(iii) Documents presented by a covered employee to dispute the result of a drug test administered under this part.

(3) Records related to referral and return to duty and follow-up testing:

(i) Records pertaining to a determination by a substance abuse professional concerning a covered employee's need for referral for assistance in resolving problems associated with drug use.

(ii) Records concerning a covered employee's entry into and completion of the program of treatment recommended by the substance abuse professional.

(4) Records related to employee training:

(i) Training materials on drug use awareness, including a copy of the employer's policy on prohibited drug use.

(ii) Names of covered employees attending training on prohibited drug

use and the dates and times of such training.

(iii) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for drug testing based on reasonable suspicion.

(iv) Certification that any training conducted under this part complies with the requirements for such training.

(5) Copies of annual MIS reports submitted to FTA.

§ 653.73 Reporting of results in a management information system.

(a) Each recipient shall submit to FTA's Office of Safety and Security by March 15 of each year a report covering the previous calendar year (January 1 through December 31), which summarizes the results of its anti-drug program.

(b) Each recipient shall be responsible for ensuring the accuracy and timeliness of each report submitted by an employer, consortium or joint enterprise or by a third party service provider acting on the employer's behalf.

(c) Each report that contains information on verified positive drug test results shall be submitted on the FTA Drug Testing Management Information System (MIS) Data Collection Form and shall include the following informational elements:

(1) Number of FTA covered employees by employee category.

(2) Number of covered employees subject to testing under the anti-drug regulations of the United States Coast Guard.

(3) Number of specimens collected by type of test (i.e., pre-employment, periodic, random, etc.) and employee category.

(4) Number of positives verified by a Medical Review Officer (MRO) by type of test, type of drug, and employee category.

(5) Number of negatives verified by a MRO by type of test and employee category.

(6) Number of persons denied a position as a covered employee following a verified positive drug test.

(7) Number of covered employees verified positive by an MRO or who refused to submit to a drug test, who were returned to duty in covered positions during the reporting period (having complied with the recommendations of a substance abuse professional as described in § 653.37).

(8) Number of employees with tests verified positive by a MRO for multiple drugs.

(9) Number of covered employees who were administered alcohol and

drug tests at the same time, with both a verified positive drug test result and an alcohol test result indicating an alcohol concentration of 0.04 or greater.

(10) Number of covered employees who refused to submit to a random drug test required under this part.

(11) Number of covered employees who refused to submit to a non-random drug test required under this part.

(12) Number of covered employees and supervisors who received training during the reporting period.

(13) Number of fatal and nonfatal accidents which resulted in a verified positive post-accident drug test.

(14) Number of fatalities resulting from accidents which resulted in a verified positive post-accident drug test.

(15) Identification of FTA funding source(s).

(d) If all drug test results were negative during the reporting period, the employer must use the "EZ form" (Appendix C). It shall contain:

(1) Number of FTA covered employees.

(2) Number of covered employees subject to testing under the anti-drug regulation of the United States Coast Guard.

(3) Number of specimens collected and verified negative by type of test and employee category.

(4) Number of covered employees verified positive by an MRO or who refused to submit to a drug test, who were returned to duty in covered positions during the reporting period (having complied with the recommendations of a substance abuse professional as described in § 653.37).

(5) Number of covered employees who refused to submit to a random drug test under this part and how many of those were random test refusals.

(6) Number of covered employees who refused to submit to a non-random drug test required under this part.

(7) Number of covered employees and supervisors who received training during the reporting period.

(8) Identification of FTA funding source(s).

§ 653.75 Access to facilities and records.

(a) Except as required by law, or expressly authorized or required in this section, no employer may release information pertaining to a covered employee that is contained in records required to be maintained by § 653.71.

(b) A covered employee is entitled, upon written request, to obtain copies of any records pertaining to the covered employee's use of prohibited drugs, including any records pertaining to his or her drug tests. The employer shall provide promptly the records requested

by the employee. Access to a covered employee's records shall not be contingent upon payment for records other than those specifically requested.

(c) An employer shall permit access to all facilities utilized in complying with the requirements of this part to the Secretary of Transportation or any DOT agency with regulatory authority over the employer or any of its employees or to a State oversight agency authorized to oversee rail fixed guideway systems.

(d) An employer shall disclose data for its drug testing program and any other information pertaining to the employer's anti-drug program required to be maintained by this part, when requested by the Secretary of Transportation or any DOT agency with regulatory authority over the employer or covered employee or to a State oversight agency authorized to oversee rail fixed guideway systems.

(e) When requested by the National Transportation Safety Board as part of an accident investigation, employers shall disclose information related to the employer's administration of a drug test following the accident under investigation.

(f) Records shall be made available to a subsequent employer upon receipt of written request from the covered employee. Subsequent disclosure by the employer is permitted only as expressly authorized by the terms of the covered employee's request.

(g) An employer may disclose information required to be maintained under this part pertaining to a covered employee to the employee or the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual, and arising from the results of a drug test administered under this part (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the covered employee.)

(h) An employer shall release information regarding a covered employee's record as directed by the specific, written consent of the employee authorizing release of the information to an identified person.

Subpart F—Certifying Compliance

§ 653.81 Compliance a condition of FTA financial assistance.

(a) *General.* A recipient may not be eligible for Federal financial assistance under section 3, 9, or 18 of the Federal Transit Act, as amended, or under section 103(e)(4) of title 23 of the United States Code if a recipient fails to establish and implement an anti-drug

program as required by this part. Failure to certify compliance with these requirements, as specified in § 653.83, will result in the suspension of a grantee's eligibility for Federal funding.

(b) *Criminal violation.* A recipient is subject to criminal sanctions and fines for false statements or misrepresentations under section 1001 of title 18 of the United States Code.

(c) *State's role.* Each State shall certify compliance on behalf of its section 3, 9 or 18 subrecipients, as applicable, whose grant the State administers. In so certifying, the State shall ensure that each subrecipient is complying with the requirements of this part. A section 3, 9 or 18 subrecipient, through the administering State, is subject to suspension of funding from the State if such subrecipient is not in compliance with this part.

§ 653.83 Requirement to certify compliance.

(a) A recipient of FTA financial assistance shall certify annually to the applicable FTA Regional Office compliance with the requirements of this part, including the training requirements. Large operators shall certify compliance initially by January 1, 1995. Small operators and States shall certify compliance initially by January 1, 1996.

(b) A certification must be authorized by the organization's governing board or other authorizing official, and must be signed by a party specifically authorized to do so. A certification must comply with the applicable sample certification provided in Appendix A to this part.

Appendix A to Part 653—Certification of Compliance

This appendix contains two separate examples of certification language. The first example consists of the generally applicable certification language. Example II should be used by employers who are covered by the Federal Railroad Administration's anti-drug regulation.

I

(a) *For recipients who are large or small operators*

I, (name), (title), certify that (name of recipient) and its contractors, as required, for (name of recipient), has established and implemented an anti-drug program in accordance with the terms of 49 CFR part 653. I further certify that the employee training conducted under this part meets the requirements of 49 CFR part 653.

(b) *For States certifying on behalf of its subrecipients and their contractors*

I, (name, title) on behalf of (STATE) certify that the entities on the attached list of FT Act subrecipients operating in this State, have established and implemented anti-drug programs in accordance with the terms of 49 CFR part 653.

II

The text of the certification of an employer that provides commuter rail transportation service regulated by the Federal Railroad Administration shall be as follows:

I, (name), (title), certify that (name of recipient) and its contractors, as required, for (name of recipient), has an anti-drug program that meets the requirements of the Federal Railroad Administration's regulations for employees regulated by the Federal Railroad Administration, and has established and

implemented an anti-drug program in accordance with the terms of 49 CFR part 653 for all other covered employees who perform safety-sensitive functions.

BILLING CODE 4910-57-P

**APPENDIX B TO PART 653 - DRUG TESTING MANAGEMENT INFORMATION SYSTEM (MIS)
DATA COLLECTION FORM**

INSTRUCTIONS

The following instructions are to be used as a guide for completing the drug-testing information in the Federal Transit Administration (FTA) Drug Testing MIS Data Collection Form. These instructions outline and explain the information requested and indicate the probable sources for this information. A sample testing results table with a narrative explanation is provided on pages iii-v as an example to facilitate the process of completing the form correctly.

This reporting form includes six sections. Collectively, these sections address the data elements required in the FTA and the U.S. Department of Transportation (DOT) drug testing regulations. The six sections, the page number for the instructions, and the page location on the reporting form are:

<u>Section</u>	<u>Instructions Page</u>	<u>Reporting Form Page</u>
A. EMPLOYER INFORMATION	i	1
B. COVERED EMPLOYEES	i	2
C. DRUG TESTING INFORMATION	ii-v	3-4
D. OTHER DRUG TESTING/PROGRAM INFORMATION	v	5
E. DRUG TRAINING/EDUCATION	vi	5
F. FTA FUNDING SOURCES	vi	5

Page 1 **EMPLOYER INFORMATION** (Section A) requires the name of the employer for which the report is done, a current address, contact name, and phone number. Below this, information must be entered for the consortium used (if applicable). Finally, a signature, title and date are required certifying the correctness and completeness of the form. Note: A separate report must be submitted by each FTA recipient for each of its contract service and contract maintenance providers covered by the FTA drug testing regulation.

Page 2 **COVERED EMPLOYEES** (Section B) requires a count for each employee category that must be tested under the FTA drug testing regulation. The employee categories are: Revenue Service Vehicle Operation, Revenue Service Vehicle and Equipment Maintenance, Revenue Service Vehicle Control/Dispatch, Commercial Driver License (CDL) Holders who operate Non-Revenue Service Vehicles, and Security Personnel who carry Firearms. The most likely source for this information is the employer's personnel department. These counts should be based on the

recipient's or contractor's records for the reported year. The **TOTAL** is a count of all covered employees for all categories combined, i.e., the sum of the columns.

Additional information must be completed if the employer has personnel who perform duties also covered by the anti-drug rule of the United States Coast Guard (USCG). **NUMBER OF EMPLOYEES COVERED BY THE USCG**, requires that you identify the number of employees in each employee category.

Section C is used to summarize the drug testing results for applicants and covered employees. There are six categories of testing to be completed. The first part of the table is where you enter the data on pre-employment testing. The following five parts are for entering drug testing data on random, post-accident, reasonable suspicion, return to duty and follow-up testing, respectively. Items necessary to complete these tables include:

- 1) the number of specimens collected in each employee category;
- 2) the number of specimens tested which were verified negative and verified positive for any drug(s); and
- 3) individual counts of those specimens which were verified positive for each of the five drugs.

Do not include results of quality control (QC) samples submitted to the testing laboratory in any of the tables.

A sample table with detailed instructions is provided for the first part, **PRE-EMPLOYMENT** testing information. The format and explanations used for the sample apply to all six parts of the table in Section C.

Information on actions taken with those persons testing positive is required at the end of both pages. Specific instructions for providing this latter information are given after the instructions for completing the table in Section C.

Page 3

DRUG TESTING INFORMATION (Section C) requires information for drug testing by category of testing. All numbers entered into the pre-employment category section of the table should be separated into the category of employment for which the person was applying or transferring. The other categories are for employee testing and require information for employees in **covered positions** only. Each part of this table must be completed for each category of testing. These categories include: (1) random, (2) post-accident, (3) reasonable suspicion, (4) return to duty, and (5) follow-up testing. These numbers **do not** include refusals for testing. A sample section of the table with example numbers is presented on page iv.

Three types of information are necessary to complete the left side of this table. The first blank column with the heading "**NUMBER OF SPECIMENS COLLECTED**," requires a count for all collected specimens by employee category. The second blank column with the heading "**NUMBER OF SPECIMENS VERIFIED NEGATIVE**," requires a count for all completed tests by employee category that were verified negative by your Medical Review Officer (MRO).

The third blank column with the heading "NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS," refers to the number of specimens provided by applicants or employees that were verified positive. "Verified positive" means the results were verified by your MRO

The right hand portion of this table, with the heading "NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG," requires counts of positive tests for each of the five drugs for which tests were done, i.e., marijuana (THC), cocaine, phencyclidine (PCP), opiates, and amphetamines. The number of specimens positive for each drug should be entered in the appropriate column for that drug type. Again, "verified positive" refers to test results verified by your MRO.

If an applicant or employee tested positive for more than one drug; for example, both marijuana and cocaine, that person's positive results would be included once in each of the appropriate columns (marijuana and cocaine).

Each column in the table should be added and the answer entered in the row marked "TOTAL".

A sample table is provided on page iv with example numbers.

Page 3

Below the part of the table containing pre-employment testing information is a box with the heading "Number of persons denied a position as a covered employee following a verified positive drug test". This is simply a count of those persons who were not placed in a covered position because they tested positive for one or more drugs.

SAMPLE APPLICANT TEST RESULTS TABLE

The following example is for Section C, **DRUG TESTING INFORMATION**, which summarizes pre-employment testing results. The procedures detailed here also apply to the other categories of testing in Section C which require you to summarize testing results for employees. This example uses the categories "Revenue Vehicle Operation" and "Armed Security Personnel" to illustrate the procedures for completing the form.

A

Urine specimens were collected for 157 applicants for revenue service vehicle operation positions during the reporting year. This information is entered in the first blank column of the table in the row marked "Revenue Vehicle Operation".

B

The Medical Review Officer (MRO) for the employer reported that 153 of those 157 specimens from applicants for revenue service vehicle operation positions were negative (i.e., no drugs were detected). Enter this information in the second blank column of the table in the row marked "Revenue Vehicle Operation".

C

The MRO for the employer reported that 4 of those 157 specimens from applicants for revenue service vehicle operation positions were positive (i.e., a drug or drugs).

were detected). Enter this information in the third blank column of the table in the row marked "Revenue Vehicle Operation".

D

With the 4 specimens that tested positive, the following drugs were detected:

<u>Specimen</u>	<u>Drugs</u>
#1	Marijuana
#2	Amphetamines
#3	Marijuana and Cocaine (Multi-drug specimen)
#4	Marijuana

Marijuana was detected in three (3) specimens, cocaine in one (1), and amphetamines in one (1). This information is entered in the columns on the right hand side of the table under each of these drugs. Two different drugs were detected in specimen #3 (multi-drug) so an entry is made in both the marijuana and the cocaine column for this specimen. Information on multi-drug specimens must also be entered in Section D, **OTHER DRUG TESTING/PROGRAM INFORMATION**, on page 5 of the reporting form.

Please note that the sample data collection form also has information for armed security personnel on line two. The same procedures outlined for revenue service vehicle operation should be followed for entering the data on armed security personnel. With applicants for armed security personnel positions, 107 specimens were collected resulting in 105 verified negatives and 2 verified positives -- 1 for marijuana and 1 for opiates. This information is entered in the row marked "Armed Security Personnel".

E

The last row, marked "TOTAL", requires you to add the numbers in each of the columns. With this example, 157 specimens from applicants for revenue service vehicle operation positions were collected and 107 for applicants for armed security personnel positions. The total for that column would be 264 (i.e., 157+107). The same procedure should be used for each column, i.e., add all the numbers in that column and place the answer in the last row.

PRE-EMPLOYMENT						
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS TESTED NEGATIVE	NUMBER OF SPECIMENS TESTED POSITIVE FOR	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG		
				Marijuana	Cocaine	Amphetamines
Revenue Service Vehicle Operation	157	157	4	3	1	1
Armed Security Personnel	107	105	2	1	1	0
TOTAL	264	262	6	4	2	1

Note that adding up the numbers for each type of drug in a row ("NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG") will not always match the number entered in the third column, "NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS". The total for the numbers on the right hand side of the table may differ from the number of specimens testing positive since some specimens may contain more than one drug.

Remember that the same procedures indicated above are to be used for completing all of the categories for testing in Section C.

- Page 4 Following the table that summarizes **DRUG TESTING INFORMATION**, you must provide counts of fatal and non-fatal accidents and fatalities which resulted in positive post-accident drug tests for any employee involved in the accident. This information should be available from the safety program manager or the drug program manager.
- Page 4 Also following the table that summarizes **DRUG TESTING INFORMATION**, you must provide a count of employees returned to duty during this reporting period who had a verified positive drug test or refused a drug test required under the FTA rule. This information should be available from the personnel office and/or drug program manager.
- Page 5 **OTHER DRUG TESTING/PROGRAM INFORMATION** (Section D) requires that you complete a table dealing with specimens positive for more than one drug, employees testing positive for both drugs and alcohol, and a table dealing with employees who refused to submit to a drug test.
- Page 5 **SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG** requires information on specimens that contained more than one drug. Indicate the **EMPLOYEE CATEGORY** and the **NUMBER OF VERIFIED POSITIVES**. Then specify the combination of drugs reported as positive by placing the number in the appropriate columns. For example, if marijuana and cocaine were detected in 3 revenue vehicle operator specimens, then you would write "Revenue Vehicle Operation" as the employee category, "3" as the number of verified positives, and "3" in the columns for "Marijuana" and "Cocaine". If marijuana and opiates were detected in 2 revenue vehicle operator specimens, then you would write "Revenue Vehicle Operation" as the employee category, "2" as the number of verified positives, and "2" in the columns for "Marijuana" and "Opiates".
- Page 5 Next you must provide a count of employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater.
- Page 5 **EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST** requires information on the **NUMBER OF COVERED EMPLOYEES** who refused to submit to a random or non-random (pre-employment, post-accident, reasonable suspicion, return to duty, or follow-up) drug test required under the FTA regulation.

Page 5 **DRUG TRAINING/EDUCATION** (Section E) requires information on the number of covered employees and supervisory personnel who have received drug training during the current reporting period.

Page 5 **FTA FUNDING SOURCES** (Section F) asks for the sources of FTA funds for your organization. Simply place a check mark by each applicable funding section(s).

For FTA Use Only

FTA DRUG TESTING MIS DATA COLLECTION FORM

OMB No. 2132-0556

YEAR COVERED BY THIS REPORT: 19__

A. EMPLOYER INFORMATION

Name _____

Address _____

Contact _____

Phone _____

Consortium Used (if applicable)

Name _____

Address _____

Contact _____

Phone _____

I, the undersigned, certify that the information provided on this Federal Transit Administration Drug Testing Management Information System Data Collection Form is, to the best of my knowledge and belief, true, correct, and complete for the period stated.

Signature_____
Date of Signature_____
Title

Title 18, U.S.C. Section 1001, makes it a criminal offense subject to a maximum fine of \$10,000, or imprisonment for not more than 5 years, or both, to knowingly and willfully make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States.

The Federal Transit Administration estimates that the average burden for this report form is 8 hours. You may submit any comments concerning the accuracy of this burden estimate or any suggestions for reducing the burden to: Office of Safety and Security (TTS-3); Federal Transit Administration; 400 7th St., S.W.; Washington, D.C. 20590; OR Office of Management and Budget, Paperwork Reduction Project (2132-0556); Washington, D.C. 20503.

B. COVERED EMPLOYEES

COVERED EMPLOYEES		
EMPLOYEE CATEGORY	NUMBER OF FTA COVERED EMPLOYEES	NUMBER OF EMPLOYEES COVERED BY THE USCG
Revenue Vehicle Operation		
Revenue Vehicle and Equipment Maintenance		
Revenue Vehicle Control/Dispatch		
CDL/Non-Revenue Vehicle		
Armed Security Personnel		
TOTAL		

READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:

1. All items refer to the **current** reporting period only (for example, January 1, 1994 to December 31, 1994).
2. This report is only for testing **REQUIRED BY THE FEDERAL TRANSIT ADMINISTRATION (FTA) AND THE U.S. DEPARTMENT OF TRANSPORTATION (DOT)**:
 - Results should be reported only for employees in **COVERED POSITIONS** as defined by the FTA drug testing regulation.
 - The information requested should only include testing for marijuana (THC), cocaine, phencyclidine (PCP), opiates, and amphetamines using the standard procedures required by DOT regulation 49 CFR Part 40.
3. Information on refusals for testing should only be reported in Section D ["OTHER DRUG TESTING INFORMATION"]. Do not include refusals for testing in other sections of this report.
4. Do not include the results of any quality control (QC) samples submitted to the testing laboratory in any of the tables.
5. Complete all items; **DO NOT LEAVE ANY ITEM BLANK**. If the value for an item is zero (0), place a zero (0) on the form.

This part of the form requires information on VERIFIED POSITIVE and VERIFIED NEGATIVE drug tests. These are the results that are reported to you by your Medical Review Officer (MRO).

C. DRUG TESTING INFORMATION

EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
PRE-EMPLOYMENT								
Revenue Vehicle Operation								
Revenue Vehicle and Equipment Maintenance								
Revenue Vehicle Control/Dispatch								
CDL/Non-Revenue Vehicle								
Armed Security Personnel								
Total								
RANDOM								
Revenue Vehicle Operation								
Revenue Vehicle and Equipment Maintenance								
Revenue Vehicle Control/Dispatch								
CDL/Non-Revenue Vehicle								
Armed Security Personnel								
Total								
POST-ACCIDENT								
Revenue Vehicle Operation								
Revenue Vehicle and Equipment Maintenance								
Revenue Vehicle Control/Dispatch								
CDL/Non-Revenue Vehicle								
Armed Security Personnel								
Total								
Number of persons denied a position as a covered employee following a verified positive drug test:								

C. DRUG TESTING INFORMATION (cont.)

EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
REASONABLE SUSPICION								
Revenue Vehicle Operation								
Revenue Vehicle and Equipment Maintenance								
Revenue Vehicle Control/Dispatch								
CDL/Non-Revenue Vehicle								
Armed Security Personnel								
Total								
RETURN TO DUTY								
Revenue Vehicle Operation								
Revenue Vehicle and Equipment Maintenance								
Revenue Vehicle Control/Dispatch								
CDL/Non-Revenue Vehicle								
Armed Security Personnel								
Total								
FOLLOW-UP								
Revenue Vehicle Operation								
Revenue Vehicle and Equipment Maintenance								
Revenue Vehicle Control/Dispatch								
CDL/Non-Revenue Vehicle								
Armed Security Personnel								
Total								
Number of accidents, as defined by the FTA drug testing regulation, which resulted in a positive post-accident drug test:				FATAL		NON-FATAL		
Number of fatalities resulting from accidents which resulted in a positive post-accident drug test:								
Number of employees returned to duty during this reporting period who had a verified positive drug test or refused a drug test required under the FTA rule:								

D. OTHER DRUG TESTING/PROGRAM INFORMATION

SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG						
EMPLOYEE CATEGORY	NUMBER OF VERIFIED POSITIVES	Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines

Number of employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater:	
---	--

EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST	Number
Covered employees who refused to submit to a random drug test required under the FTA regulation:	
Covered employees who refused to submit to a non-random drug test required under the FTA regulation:	

E. DRUG TRAINING/EDUCATION

TRAINING DURING CURRENT REPORTING PERIOD	Number
Covered employees who have received at least 60 minutes of initial training on the consequences, manifestations, and behavioral cues of drug use as required by the FTA drug testing regulation:	
Supervisory personnel who have received 60 minutes of initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use as required by the FTA drug testing regulation:	

F. FTA FUNDING SOURCES

FTA FUNDING SOURCES				
Check all sections that apply:	3	9	16(b)(2)	18

APPENDIX C TO PART 653 - DRUG TESTING MANAGEMENT INFORMATION SYSTEM (MIS)
"EZ" DATA COLLECTION FORM

INSTRUCTIONS

The following instructions are to be used as a guide for completing the Federal Transit Administration (FTA) Drug Testing MIS "EZ" Data Collection Form. This form should only be used if there are no positive tests to be reported by your company. These instructions outline and explain the information requested and indicate the probable sources for this information. This reporting form includes four sections. These sections address the data elements required in the FTA and the U.S. Department of Transportation (DOT) drug testing regulations.

SECTION A - EMPLOYER INFORMATION requires the company name for which the report is done, a current address, contact name, and phone number. Below this, information must be entered for the consortium used (if applicable). Finally, a signature, title, and date are required certifying the correctness and completeness of the form. Also indicate the year covered by this report. Note: A separate report must be submitted by each FTA recipient for each of its contract service and contract maintenance providers covered by the FTA drug testing regulation

SECTION B - COVERED EMPLOYEES requires a count for each employee category that must be tested under the FTA drug testing regulation. The employee categories are: Revenue Service Vehicle Operation, Revenue Service Vehicle and Equipment Maintenance, Revenue Service Vehicle Control/Dispatch, Commercial Driver License (CDL) Holders who operate Non-Revenue Service Vehicles, and Security Personnel who carry Firearms. The most likely source for this information is the employer's personnel department. These counts should be based on the recipient's or contractor's records for the reported year. The **TOTAL** is a count of all covered employees for all categories combined, i.e., the sum of the columns.

Additional information must be completed if the employer has personnel who perform duties also covered by the anti-drug rule of the United States Coast Guard (USCG). **NUMBER OF EMPLOYEES COVERED BY THE USCG**, requires that you identify the number of employees in each employee category.

SECTION C - DRUG TESTING INFORMATION requires information for drug testing, refusal for testing, and training. The first table requests information on the **NUMBER OF SPECIMENS COLLECTED AND VERIFIED NEGATIVE** in each category for testing. All numbers entered into the pre-employment category section of the table should be separated into the category of employment for which the person was applying or transferring. The other categories are for employee testing and require information for employees in **covered positions** only. Each part of this table must be completed for each category of testing. These categories include: (1) random, (2) post-accident, (3) reasonable suspicion, (4) return to duty, and (5) follow-up testing. "COLL" requires the number of specimens collected in each employee category for each category of testing. "NEG" requires a count for all completed tests by employee category that were verified negative by your Medical Review Officer (MRO). Do not include results of quality control (QC) samples submitted to the testing laboratory in any of the categories. Each column in the table should be added and the answer entered in the row marked "TOTAL".

Following the table that summarizes **DRUG TESTING INFORMATION**, you must provide a count of employees returned to duty during this reporting period who had a verified positive drug test or refused a drug test required under the FTA rule. This information should be available from the personnel office and/or drug program manager.

EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST requires a count of the **NUMBER OF COVERED EMPLOYEES** who refused to submit to a random or non-random (pre-employment, post-accident, reasonable suspicion, return to duty, or follow-up) drug test required under the FTA regulation.

DRUG TRAINING/EDUCATION DURING CURRENT REPORTING PERIOD requires information on the number of covered employees and supervisory personnel who have received drug training during the current reporting period.

SECTION D - FTA FUNDING SOURCES asks for the sources of FTA funds for your organization. Simply place a check mark by each applicable funding section(s).

For FTA Use Only

FTA DRUG TESTING MIS "EZ" DATA COLLECTION FORM

OMB No: 2132-0556

YEAR COVERED BY THIS REPORT: 19__

A. EMPLOYER INFORMATION

Company Name _____

Address _____

Contact _____

Phone _____

Consortium Used (if applicable)

Name _____

Address _____

Contact _____

Phone _____

I, the undersigned, certify that the information provided on the attached Federal Transit Administration Drug Testing Management Information System "EZ" Data Collection Form is, to the best of my knowledge and belief, true, correct, and complete for the period stated.

Signature_____
Date of Signature_____
Title

Title 18, U.S.C. Section 1001, makes it a criminal offense subject to a maximum fine of \$10,000, or imprisonment for not more than 5 years, or both, to knowingly and willfully make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States.

The Federal Transit Administration estimates that the average burden for this report form is 8 hours. You may submit any comments concerning the accuracy of this burden estimate or any suggestions for reducing the burden to: Office of Safety and Security (TTS-3); Federal Transit Administration; 400 7th St., S.W.; Washington, D.C. 20590; OR Office of Management and Budget, Paperwork Reduction Project (2132-0556); Washington, D.C. 20503.

B. COVERED EMPLOYEES

COVERED EMPLOYEES		
EMPLOYEE CATEGORY	NUMBER OF FTA COVERED EMPLOYEES	NUMBER OF EMPLOYEES COVERED BY THE USCG
Revenue Vehicle Operation		
Revenue Vehicle and Equipment Maintenance		
Revenue Vehicle Control/Dispatch		
CDL/Non-Revenue Vehicle		
Armed Security Personnel		
TOTAL		

C. DRUG TESTING INFORMATION

NUMBER OF SPECIMENS COLLECTED AND VERIFIED NEGATIVE												
EMPLOYEE CATEGORY	PRE-EMPLOYMENT		RANDOM		POST-ACCIDENT		REASONABLE SUSPICION		RETURN TO DUTY		FOLLOW-UP	
	COLL	NEG	COLL	NEG	COLL	NEG	COLL	NEG	COLL	NEG	COLL	NEG
Revenue Vehicle Operation												
Revenue Vehicle and Equipment Maintenance												
Revenue Vehicle Control/Dispatch												
CDL/Non-Revenue Vehicle												
Armed Security Personnel												
TOTAL												

Number of employees returned to duty during this reporting period who had a verified positive drug test or refused a drug test required under the FTA rule:	
---	--

EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST	Number
Covered employees who refused to submit to a random drug test required under the FTA regulation:	
Covered employees who refused to submit to a non-random drug test required under the FTA regulation:	

DRUG TRAINING/EDUCATION DURING CURRENT REPORTING PERIOD	Number
Covered employees who have received at least 60 minutes of initial training on the consequences, manifestations, and behavioral cues of drug use as required by the FTA drug testing regulation:	
Supervisory personnel who have received 60 minutes of initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use as required by the FTA drug testing regulation:	

D. FTA FUNDING SOURCES

FTA FUNDING SOURCES				
Check all sections that apply	3	9	16(b)(2)	18

Issued: January 25, 1994.

Federico Peña,

Secretary of Transportation.

Gordon J. Linton,

Administrator.

[FR Doc. 94-2041 Filed 2-3-94; 1:00 pm]

BILLING CODE 4910-57-P

49 CFR Part 654

Tuesday
February 15, 1994

Part VIII

**Department of
Transportation**

Federal Transit Administration

49 CFR Parts 653 and 654
**Prevention of Alcohol and Prohibited
Drug Misuse in Transit Operations; Rules**

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Part 654

[Docket No 92-J]

RIN 2132-AA38

Prevention of Alcohol Misuse in Transit Operations

AGENCY: Federal Transit Administration, DOT.

ACTION: Final rule.

SUMMARY: The Omnibus Transportation Employee Testing Act of 1991 directs the Federal Transit Administration to issue regulations on drug and alcohol testing for mass transit workers in safety-sensitive positions. This document accordingly sets forth the agency's alcohol misuse prevention program, which is intended to increase the safety of mass transit operations.

EFFECTIVE DATE: March 17, 1994.

FOR FURTHER INFORMATION CONTACT: For program issues, Judy Meade, Office of Safety and Security, Federal Transit Administration, DOT, 400 Seventh St., SW., room 6432, Washington DC 20590. Telephone: 202-366-2896. For legal questions, Nancy Zaczek or Daniel Duff, Office of the Chief Counsel, Federal Transit Administration, DOT, 400 Seventh St., SW., room 9316, Washington DC 20590. Telephone: 202-366-4011 (voice); 202-366-2979 (TDD). Copies of the regulation are available in alternative formats upon request.

SUPPLEMENTARY INFORMATION: Because of the length of this preamble, the following outline of the rule's introductory material is provided.

I. How to read this rule.

II. Discussion

A. Background

B. The Omnibus Transportation Employee Testing Act of 1991

C. The Anti-Drug Rule

D. Study of alcohol use in the transit industry

E. Summary of the Final Rule

F. Overview of the Comments

III. Discussion of the Comments

A. Multi-modal jurisdiction

B. Accident

C. Safety-sensitive function

D. Covered employee/contractor

E. Pre-employment/pre-duty testing

F. Reasonable suspicion testing

G. Random testing/random testing rate

H. Post-accident testing

I. Return to duty/follow-up testing

J. Treatment

K. Training

L. Management Information System (MIS) reporting requirement

M. Implementation date

N. Combined drug and alcohol rules

P. Indian Tribal Governments

Q. Waivers

III. Section-by-Section Analysis

IV. Americans with Disabilities Act of 1990

V. Economic Analysis

VI. Regulatory Process Matters

I. How To Read This Rule

This rule has three components: Part 654, "Prevention of Alcohol Misuse in Transit Operations"; the common preamble by the Office of the Secretary (OST), "Limitation on Alcohol Use By Transportation Workers" published elsewhere in today's *Federal Register*; and Part 40, "Procedures for Transportation Workplace Drug and Alcohol Testing programs." This document is part 654, the Federal Transit Administration's (FTA) alcohol testing regulations for recipients of certain kinds of Federal funding. This preamble to part 654 briefly explains those issues unique to the transit industry and is followed by the text of the substantive regulation. The common preamble, on the other hand, discusses the issues and comments common to all five DOT agencies issuing final alcohol rules today. Finally, the testing procedures for administering alcohol and drug tests are set forth in part 40 and the issues concerning it are discussed in its preamble.

II. Discussion

A. Background

On December 15, 1992, the Federal Transit Administration (FTA) published a Notice of Proposed Rulemaking (NPRM) in the *Federal Register* at 57 FR 59646, entitled "Prevention of Alcohol Misuse in Transit Operations." The NPRM invited comment from the public on the proposed rule, which would require certain recipients of Federal transit funding to have a comprehensive alcohol misuse prevention program. FTA provided a 120-day comment period and received over 125 comments on the regulation proposed in the NPRM.

In addition to receiving written comments on the NPRM, in 1993 FTA held three public hearings on the rule: on February 25-26, in Washington DC; on March 1-2, in Chicago, Illinois; and on March 4-5, in San Francisco, California. Each hearing was recorded by a court reporter; the transcript of each hearing and any statements or other material submitted to the hearing officer during the hearings are contained in the public docket to this rule and were considered in developing this final rule.

B. The Omnibus Transportation Employee Testing Act of 1991

The Omnibus Transportation Employee Testing Act of 1991 (the Act) (Title V, Pub. L. 102-143, October 28, 1991) mandates some operating administrations within the Department of Transportation, including the FTA, to issue regulations on the misuse of alcohol by safety-sensitive employees. While there is a complete discussion of the various provisions of the Act in the Department-wide preamble found elsewhere in today's issue of the *Federal Register*, the following discussion highlights provisions of the Act concerning the FTA.

The Federal Transit Administration must issue regulations requiring recipients of funds under section 3, 9, or 18 of the Federal Transit Act, as amended (FT Act), or section 103(e)(4) of title 23 of the United States Code to test safety-sensitive employees for the use of alcohol in violation of law or Federal regulation. Because certain recipients of FTA funds are regulated by the Federal Railroad Administration (FRA) or the Federal Highway Administration (FHWA), the Act permits such recipients to be subject to the alcohol misuse regulations of those agencies.

Compliance with FTA's rule is a condition of the receipt of Federal transit funding. The Act authorizes FTA to withhold that funding if a recipient is not in compliance with FTA's rule or, as appropriate, the alcohol misuse rules of FRA or FHWA. Specifically, the Act authorizes FTA to withhold Federal funding under section 3, 9, or 18 of the FT Act, or section 103(e)(4) of title 23 of the U.S. Code.

The Act directs the FTA to require four kinds of alcohol testing: pre-employment, reasonable suspicion, random, and post accident, and permits FTA to require periodic alcohol testing. The Act further directs FTA to require a post-accident test when there has been a loss of human life.

The Act authorizes the testing only of employees who perform safety-sensitive functions, but does not define what activities constitute a safety-sensitive function, specifically authorizing the agency to make that determination.

The Act directs FTA to require its recipients to test safety-sensitive employees for the use of alcohol in violation of Federal law or regulation (alcohol misuse) and in so doing to safeguard the privacy of safety-sensitive employees to the maximum extent practicable. It also directs that all tests which indicate the misuse of alcohol be confirmed by a scientifically recognized

method of testing capable of providing quantitative data regarding alcohol.

If a safety-sensitive employee is found to have used alcohol in violation of Federal law or regulation, the Act directs FTA to provide that person with an opportunity for evaluation and treatment. Also, the Act permits FTA, as appropriate, to permit the disqualification or dismissal of any safety-sensitive employee who has used alcohol in violation of Federal law or regulation.

In providing this regulatory authority, the Act authorizes the FTA to preempt State or local laws, rules, regulations, ordinances, standards, or orders inconsistent with this rule, except for certain provisions of State criminal law which impose sanctions for reckless conduct leading to actual loss of life, injury, or property damage.

C. The Anti-drug Rule

The Federal Transit Administration also is publishing its final anti-drug program rule elsewhere in today's issue of the Federal Register; the two rules will be implemented on the same dates.

D. Study of Alcohol Use in the Transit Industry. In 1991, FTA's Office of Safety and Security conducted a study to determine the extent of drug and alcohol use in the transit industry. The study's findings analyze the results of two surveys designed to gather information on substance abuse policies and programs as well as drug and alcohol use patterns in the transit industry. Of the two surveys, one was completed by transit system managers and the other by safety-sensitive transit employees. (See "Substance Abuse in the Transit Industry", Rept. No. DC-90-7021; November, 1991.)

The agency survey sought information on substance abuse program policies and procedures, test results indicating drug or alcohol use during calendar year 1990, disciplinary procedures, employee training, and substance related accident data. The survey was mailed to four hundred transit systems. Three hundred and six systems comprise the agency data base.

The employee survey was given to 1,975 safety-sensitive employees at nine randomly selected transit systems separated into three groups based on annual ridership. The employee questionnaire focused solely on personal use of drugs and alcohol; to a large extent the questions were standardized to facilitate comparison with a National Institute on Drug Abuse (NIDA) Household Survey.

The study was designed to guarantee respondent confidentiality for both the

agency and employee surveys. Since both surveys were voluntary, no data were collected from any system or employee who did not consent to participate.

The following are some key findings from the surveys about alcohol use:

- Of the 306 systems in the data base, 78 percent conduct some type of drug testing and 58 percent conduct alcohol testing. When asked which substance was most prevalently abused by the workforce, 75 percent of the agencies identified alcohol.

- The personal use data provided in the 1988 and 1990 NIDA household surveys provide a benchmark for comparisons of the transit industry results with those of the general population. Those results indicate that self-reported alcohol use by transit employees was only slightly lower than reported use by the general population.

- About six percent of the safety-sensitive employees reported using alcohol within five hours before reporting to duty or during duty hours.

- Most of these duty-related drinkers were also high-volume drinkers of six to ten or more drinks each occasion.

- The positive alcohol rate for vehicle and equipment maintenance personnel is 3.7 percent, twice that for vehicle operators. Dispatchers also have a positive alcohol rate twice that of vehicle operators.

Based on the study's findings, the statutorily mandated testing for substance abuse is timely and well-founded. This rulemaking should aid in the control of alcohol misuse in the transit industry.

E. Summary of the Final Rule

This rule applies to recipients of funds under section 3, 9, or 18 of the FT Act, or section 103(e)(4) of title 23 of the United States Code. It requires each employer to establish and conduct an alcohol misuse prevention program in which safety-sensitive employees are tested for the misuse of alcohol and supervisors are trained to recognize the signs and symptoms of alcohol misuse.

The rule requires the use of testing procedures found in Part 40 of title 49 of the Code of Federal Regulations.

The rule establishes a prohibited alcohol concentration level of 0.04 but also establishes another alcohol concentration range, 0.02 or greater but less than 0.04, with special ramifications attached to it.

The regulation specifies that employers may not allow safety-sensitive employees to consume alcohol under certain circumstances: (1) Four hours before performing a safety-sensitive function; (2) while performing

a safety-sensitive function; (3) after a fatal accident unless the employee has been tested, or eight hours have elapsed, whichever occurs first; or (4) after a nonfatal accident unless the employee's involvement can be completely discounted as a contributing factor to the accident, the employee has been tested, or eight hours has elapsed. The rule requires testing in the following situations:

1. Pre-employment (including transfer to a safety-sensitive position within the organization);
2. Reasonable suspicion;
3. Random;
4. Post-accident; and
5. Return to duty/follow-up.

The rule requires breath testing for all tests with an evidential breath testing device (EBT), which is a device listed on the National Highway Traffic Safety Administration's (NHTSA) Conforming Product List (CPL).

The rule requires both a screening and a confirmation test. An employer may take action based only on the results of the confirmation test.

As noted above, the rule establishes a prohibited alcohol concentration level of 0.04. If a sample from an employee on a confirmation alcohol test measures 0.04 or greater, the covered employee must be removed from his or her safety-sensitive position, be told about educational and treatment programs available, and be evaluated by a substance abuse professional to determine whether the employee has an alcohol problem. The rule does not address the issue of who should pay for the employee's treatment, which is a local issue.

If, however, the sample tests at 0.02 or greater but less than 0.04, the covered employee must be removed from his safety-sensitive position. The employer may, after some period of time, retest the employee to ensure that his alcohol concentration level is less than 0.02 and then permit him to resume his safety-sensitive position. If the employer does not retest the employee, the employer must remove him from his safety-sensitive position for at least eight hours. If an employer elects to remove the employee for eight hours, the employer is not required subsequently to administer an alcohol test before the employee resumes performing a safety-sensitive function unless the employee exhibits signs of alcohol misuse when he returns to work.

The rule applies to any entity that receives certain Federal funding from the FTA. Such an entity, called a recipient, must certify to the FTA that it will carry out the requirements of this part. Not all such recipients provide

mass transit services directly, relying instead upon other public or private entities to provide such services in whole or in part. In these cases, the direct recipient of FTA funds is legally responsible to the FTA for assuring that any entity operating on its behalf is in compliance with the alcohol testing rule.

Compliance with the rule is a condition of Federal assistance. Failure of a recipient to comply with the rule—either in its own operations or in those of an entity operating on its behalf—will result in the suspension of Federal transit funding to the recipient.

Because, as noted above, a recipient may not always directly carry out mass transit services, the rule uses “operator” or “employer” to describe those who actually may be providing transit service and therefore must comply with the alcohol testing program, but under the rule it is always the direct recipient of FTA funds that legally is responsible to FTA for complying with the rule.

F. Overview of the Comments

The FTA received 126 comments in response to the NPRM. FTA considered all comments filed in a timely manner as well as all statements and material presented at the public hearings on the rule. The breakdown among commenter categories is as follows:

Transit operators (public and private)	45
Cities and counties	8
State DOTs	22
Labor unions	6
Trade associations	7
Individual citizens	2
Nonprofit organizations/special transit providers	16
State governments	4
Public Utility	1
Member of Congress	1
Private business	1
Others	6

Many commenters addressed issues common to all of the DOT final alcohol rules published today, including what alcohol concentration level should be prohibited; how alcohol should be defined; or what conduct should constitute a refusal to submit to a test. All such general issues are addressed in the common preamble published elsewhere in today's *Federal Register*. Other commenters addressed issues unique to the transit industry, such as whether volunteer drivers should be subject to the rule, the applicability of the regulation to providers of transportation paid with publicly subsidized vouchers or scrip (user-side subsidies), or whether the rule applies to Indian tribal governments or to

section 16(b)(2) recipients. All of the major FTA issues addressed by the commenters are discussed in Section III below.

III. Discussion of the Comments

A. Multi-modal Jurisdiction

Because many FTA recipients operate a variety of different mass transit services—such as bus, rapid rail, commuter rail, or ferry boat services—they may be regulated by the FTA and by another DOT agency or agencies, such as the Federal Railroad Administration (FRA), the Federal Highway Administration (FHWA), or the United States Coast Guard (Coast Guard). In addition, the Act authorized FHWA, for the first time, to regulate intrastate Commercial Driver's License (CDL) holders, which include many transit employees. To limit the alcohol rules with which such recipients would have to comply, the NPRM discussed a proposal under which (1) FRA's alcohol misuse regulation would apply to FTA recipients that operate railroads, including the recipient's safety-sensitive employees; (2) FTA's alcohol misuse program, not FHWA's, would apply to recipients who employ or use the services of safety-sensitive employees who hold a CDL, but the individual CDL holder otherwise would remain subject to FHWA's implementation of the Commercial Motor Vehicle Safety Act of 1986; and (3) both FTA's and Coast Guard's alcohol misuse programs would apply to recipients operating vessels, and the Coast Guard would continue to regulate the individual safety-sensitive employee (vessel crew member) by pursuing licensing actions or other punitive measures.

FTA received several comments concerning the multi-modal jurisdictional issue suggesting a rather significant change to the FTA's approach to this rulemaking. Several commenters suggested that DOT should issue one regulation covering all entities regulated by any DOT agency. In contrast, other commenters suggested that FTA and FHWA should issue a joint regulation or issue two separate regulations using identical language.

FTA Response. FTA is sympathetic to the concerns of recipients regulated by more than one DOT agency alcohol testing rule, some of whom proposed a single regulation. As a practical matter, however, an agency-wide DOT alcohol rule would be difficult to implement because of the different characteristics of the various communities each agency regulates. Nevertheless, FTA addresses the multi-jurisdictional issue by clarifying the jurisdiction of FTA, FRA,

FHWA, and Coast Guard over transit entities. In this regard, we have adopted the proposal in the NPRM discussed above.

B. Accident

The vast majority of comments concerning this definition focused on incidents involving only property damage; specifically, how the seriousness of these incidents should be measured, thus justifying the administration of an alcohol test. In the NPRM we had proposed a dollar measurement, whereby an accident was any incident resulting in at least \$1,000 in total property damage.

Most commenters addressed the dollar amount proposed in the NPRM and stated that \$1,000 was too low a threshold. Some of these commenters proposed their own method of calculating a dollar threshold such as a measurement based on a vehicle's gross vehicle weight—the greater the weight the higher the property damage threshold.

Other commenters objected to the use of a dollar threshold to measure the seriousness of incidents involving only damage to property. These commenters urged us to adopt an objective measure of property damage such as FHWA's definition of accident. FHWA defines an accident involving only property damage as an incident that so disables the vehicle that it must be towed away from the scene.

Another commenter objected to the use of dollar amounts and requested that we adopt a reasonable cause standard.

Other commenters addressed the overall definition of accident. In the NPRM we had limited the definition to an incident involving a revenue service vehicle, and several commenters objected to this limitation, proposing instead that we include any incident involving a nonrevenue service vehicle as well.

FTA Response. FTA has changed the definition of “accident” in such a way that it is broadened in some respects, and narrowed in others. In particular, FTA has broadened the definition in the final rule to include occurrences involving nonrevenue service vehicles operated by a holder of a CDL. We recognize that this decision falls short of the recommendation proposed by some commenters favoring the inclusion of all occurrences involving nonrevenue service vehicles, but it is based on another consideration, avoiding overlapping jurisdictions of FTA and FHWA. Ordinarily, FHWA would regulate CDL holders as well as their employers. This new coverage in our

final rule is consistent with the agreement between FTA and FHWA that FTA's alcohol misuse program applies to the transit employers of CDL holders.

FTA has further modified the proposed definition of "accident" to distinguish the situations of different kinds of mass transit vehicles. Many mass transit vehicles, such as buses and vans, are passenger-carrying motor vehicles. FTA believes that it is sensible to use a definition of "accident" that is consistent with FHWA's for such vehicles. Therefore, we are adopting a provision paralleling FHWA's definition of "accident" (in 49 CFR 390.5). The definition states that an "accident" occurs when a vehicle (whether a mass transit vehicle or another vehicle, such as a private automobile) suffers disabling damage and is towed away from the scene of the "accident." This provision eliminates the subjectivity inherent in basing a definition on estimates of property damage.

For other vehicles—light or rapid rail cars, ferry boats, trolley cars and buses, etc.—we also believe it is best to eliminate a property damage-based standard. Instead, the final rule provides that if the mass transit vehicle is removed from revenue service as the result of the occurrence, an "accident" is deemed to take place. FTA believes that the operating practices of employers typically result in at least the temporary removal from revenue service of vehicles that have been involved in all but the most minor of mishaps.

Of course, any occurrence in which someone is killed, or injured sufficiently to require medical treatment away from the accident scene, is an "accident" for purposes of this rule, regardless of the type of transit vehicle involved.

We have further narrowed the definition of accident by deleting the reference to reportable accidents. In the NPRM we proposed that any occurrence required to be reported to FRA, FHWA, or the Coast Guard would constitute an accident, but the final rule uses only the criteria discussed above.

C. Safety-sensitive Function

Most commenters addressed the definition of "safety-sensitive" function, one of the most important definitions in the rule. Because the proposed definition had a list of functional categories, most commenters objected either to the inclusion or exclusion of a particular category. Some commenters, however, merely sought clarification of the categories in the NPRM.

Including those employees who "maintain a revenue service vehicle" in the definition particularly concerned several commenters. While most

commenters understood that this category included mechanics, some thought that it covered workers who clean rather than repair buses, rail cars, and other mass transit facilities. The remaining commenters made specific recommendations concerning mechanics, some arguing that we should exclude all mechanics, with others stating that we should exclude only those working under contract for section 18 rural operators. Yet others suggested that we should include only those mechanics working for large transit operators.

Commenters objected to only one other safety-sensitive category, "controlling the movement of revenue service vehicles," the category which includes dispatchers. These commenters contend that dispatchers do not perform a safety-sensitive function.

Although we did not include any categories involving the construction, design, or manufacture of revenue service vehicles or other mass transit equipment or facilities, several commenters suggested that we specifically exclude them from the definition. Without this specific exclusion they believe there may be some instances in which such workers might be considered to be performing a safety-sensitive function.

Other commenters recommended that we add other employee categories to the definition, including police and other security personnel, and mechanics who repair nonrevenue service vehicles.

Finally, some commenters sought clarification of the definition: whether it included volunteers and CDL holders, and on the meaning of "directly supervising an employee who is performing a safety-sensitive function."

FTA Response. We have made several changes to the definition of "safety-sensitive employee." Before describing those changes, however, we first explain why we proposed a definition based on function rather than titles. Because each transit system uses its own job classification categories, we wanted to avoid specifying particular job titles. Instead, we concluded that four job functions were critical to safety, and in the NPRM identified operating, maintaining, and controlling the movement of vehicles as those functions critical to the safety of the traveling public, and added a fourth category, first-line supervisors of anyone operating, maintaining, or controlling the movement of the vehicle. The final rule adopts these categories, with some changes.

Now a discussion of the changes made. Most notably, we have created two new categories of "safety-sensitive

functions": The carrying of a firearm for security purposes, and the operation of a nonrevenue service vehicle by a CDL holder. We include firearm-bearing police and security personnel because of the sensitivity of their position and the danger to the public should they be under the influence of alcohol.

As discussed above, FHWA regulates CDL holders, both interstate and intrastate, and their employers. FTA's relationship is with its recipients, many of whom employ CDL holders. To avoid a jurisdictional conflict, FTA and FHWA have agreed that FTA's alcohol misuse rule will apply to transit entities that employ or use the services of CDL holders, regardless of the kind of vehicle they operate.

We have also reduced the scope of the definition somewhat. While we proposed in the NPRM to include first-line supervisors of safety-sensitive employees, the final rule limits that category by covering only supervisors whose responsibilities include the performance of a safety-sensitive function. For instance, if a supervisor's job description requires her to drive a vehicle, she would be covered, but if it did not, she would not.

Further, in response to comments, we have excluded from the scope of the rule contract mechanics for any entity receiving section 18 funds.

Regarding the recommendation specifically to exclude construction, design, and manufacturing personnel, we believe it is unnecessary to do so because the list of categories in the definition is exclusive. Any functional category—such as construction or design or manufacturing—not in the definition is not subject to the rule.

Finally, some clarification on the issue of safety-sensitive employees. Volunteers are covered by the rule if they perform any safety-sensitive function. Coverage under the rule should not be based on whether an individual holds a paying position, but on whether that individual is in a position to affect the safety of the transit-riding public. The final rule definition of covered employee thus specifically includes volunteers.

Another ambiguity mentioned by several commenters concerns the maintenance category, which several commenters believed would include workers who clean rather than repair transit equipment. We do not mean to cover such workers and emphasize that only mechanics who repair vehicles or who perform routine maintenance are the types of maintenance workers covered by the rule.

D. Covered Employee/Contractor

In the NPRM the definition of covered employee included three general categories of safety-sensitive employees—those directly employed by an employer, those employed by a contractor, and applicants for a safety-sensitive position. Most comments about this definition pertained to the coverage of contractors in the NPRM which included any person or organization providing services or performing work consistent with a specific understanding or arrangement, which could be a written contract or an informal arrangement reflecting an ongoing relationship between the parties.

Many commenters objected to the inclusion of contractors within the scope of the rule, believing that employers should not be accountable for a contractor's compliance with the rule because employers have little or no control over contractors or their employees.

While other commenters did not specifically object to the inclusion of contractors, they did object to the scope of the definition of contractor and recommended that it be defined to include only those who perform work or provide service under a formal written agreement.

Other commenters sought to exclude contractors in rural areas contending that many simply would refuse to do business with the recipient rather than submit to an alcohol testing program. The remaining commenters requested that we exclude only contract mechanics from the definition.

FTA Response. In response to comments, we have made a number of changes to the wording of this safety-sensitive function, although the basic concepts in the NPRM remain unchanged.

The final rule includes direct employees, contractors and their employees, and applicants under the definition, but reflects the following changes. First, we specifically include volunteers in the definition because, as noted above, we define "safety-sensitive" functionally and look only to the function that a person performs, not whether they receive pay for their work.

Second, while many commenters objected to including contractors who perform safety-sensitive functions, we have for the most part continued to include them in light of legislative history on this issue. The following was said during the debate on the bill:

Drug and alcohol-testing requirements must not be circumvented through contracting out of work.

Safety-sensitive employees of recipients of the Federal transit grant money identified in the bill, and those safety-sensitive employees working for contractors of such recipients must be covered exactly to the same extent and in the same fashion. I know that I speak for all conferees when I say that we will not tolerate a situation where employees performing substantially the same safety-sensitive function are covered or not covered depending on whether they work directly for a public authority or an outside contractor. 137 Cong Rec. S14766 (daily ed. Oct. 16, 1991). (Statement of Sen. D'Amato).

On the other hand, we are sympathetic to the persuasive arguments of rural operators on this issue, and specifically exclude from coverage under the rule contract mechanics who perform work or provide services for section 18 rural recipients. We believe that the potential cost and hardship of including such contractors outweighs any benefits including them might bring, since so many rural operators believe that they simply would be unable to get any outside servicing if providers of that service were subject to this rule.

E. Pre-employment/Pre-duty Testing

Although the NPRM included the pre-employment/pre-duty tests within one provision, in fact they apply to different types of workers-applicants in one instance, and transferees from a nonsafety-sensitive position to a safety-sensitive position in the other. Nevertheless, both applicants and transferees must take an alcohol test indicating an alcohol concentration level less than 0.04 before they can perform a safety-sensitive function for the first time. Hence, the NPRM would allow an employer to hire someone who has taken an alcohol test with a result of 0.04 or greater so long as that individual is retested and has a result less than 0.04 before he or she performs a safety-sensitive function. Under the notice provision, the NPRM required applicants and transferees to be notified that they must submit to an alcohol test. Moreover, a pre-employment alcohol test could be waived by the employer, which distinguishes the alcohol NPRM from the anti-drug NPRM.

Commenters focused on these issues. Specifically, commenters requested that we add a notification requirement to the pre-employment/pre-duty testing provision of the final rule. On the other issue, commenters stated that employers should not be able to accept the results of an alcohol test administered under the requirements of another DOT agency.

FTA Response. In the NPRM we did require an employer to notify an applicant that he or she would be

required to submit to an alcohol test. We have made no changes to this requirement in the final rule.

We have, however, changed the language in the rule which ensures that the employer is aware that it has the discretion to waive a pre-employment alcohol test in one limited circumstance when the employee has been tested within the previous six months under the rules of another DOT agency. This is not a change from the NPRM, rather it is a clarification.

We have made another change in response to commenters who were confused by the term pre-duty testing and assumed that it meant that an employee must be tested every time they were about to perform a safety-sensitive function. This is not the case. We meant to apply that provision to transferees from a nonsafety-sensitive position to a safety-sensitive position. To clarify our intent we have deleted the phrase "pre-duty" (in the context of pre-employment alcohol testing) from the final rule.

F. Reasonable Suspicion Testing

Commenters responding to this general area raised numerous issues. Before discussing those issues, however, we first briefly summarize the reasonable suspicion testing provision as it appeared in the NPRM.

Reasonable suspicion testing is specifically required by the Act, and the NPRM proposed authorizing an employer to conduct a test when it believes the employee is exhibiting certain characteristics of alcohol misuse. The NPRM never identifies or defines those characteristics, but authorizes an employer to require a reasonable suspicion alcohol test on the basis of specific, contemporaneous, articulable observations concerning the appearance and behavior of the covered employee, which characterize alcohol misuse.

Moreover, those observations must be made by a supervisor trained in detecting the symptoms of alcohol misuse. The NPRM specifically required that a supervisor receive one hour of training, which must include information about the manifestations and behavioral characteristics indicating alcohol misuse.

Commenters took a number of positions on this issue. Some wanted only one supervisor to make the reasonable suspicion determination, others wanted two. Some believed that the test could be based on the observations of a third party, such as a transit passenger.

Commenters also took different positions on the amount of time a supervisor should be trained, although

most thought that one hour was not enough time to adequately train a supervisor. Some commenters suggested four hours of training, others suggested four hours of combined alcohol and drug training, and yet another suggested five to ten hours of training with the additional requirement of a proficiency certification.

Many commenters suggested that the language of the reasonable suspicion provision be broadened to include other factors in the determination. For instance, some suggested that employers be allowed to review an employee's attendance records for absenteeism and tardiness. Others suggested that an employer be allowed to examine other records indicating whether the employee had any moving traffic violations, occupational injuries, or operating rule violations. And others suggested that an employer be able to look at the pattern of the employee's conduct both on and off the job.

Lastly, the commenters discussed the matter of whether there should be written documentation of a reasonable suspicion determination. The NPRM did not require written documentation, but stated that any document generated as a result of a reasonable suspicion determination must be maintained for a year. Several commenters recommended that a written determination be required, with one suggesting that a checklist also be required. One commenter recommended that a second supervisor concur in the written determination before a reasonable suspicion test could be conducted. Another commenter suggested that written documentation be required only if the employee tested at 0.02 or greater and subsequently was disciplined.

FTA Response. In the final rule we essentially have retained the reasonable suspicion provision from the NPRM, with only minor changes, because we believe it adequately balances the rights of employees against the rights of the traveling public. For instance, we believe that the observations must be made by a supervisor trained in detecting the symptoms of alcohol misuse rather than by some third party (Of course a third party could alert a transit operator about a particular situation, which might trigger a supervisor to pay particular attention to the affected employee.)

We also believe that a determination made by a single supervisor trained in detecting the signs of alcohol misuse adequately protects the employee, and we were concerned about the cost of requiring two supervisors to make the determination.

Although many commenters recommended that supervisors receive more than one hour of training, we have not changed this requirement in the final rule, being sensitive to the costliness of such training. Individual employers of course are free to provide as much additional training beyond the required one hour as they like.

Employers also are allowed to combine drug and alcohol training, provided the required time frames are satisfied.

The standard used to authorize a reasonable suspicion test remains unchanged in the final rule, which means that a supervisor may consider only short-term indicators of alcohol misuse. We stress that long-term indications of alcohol misuse such as absenteeism or tardiness or moving traffic violations cannot be used as the basis for conducting a reasonable suspicion alcohol test, which must only be based on contemporaneous and articulable observations. Of course, a supervisor may particularly be alert to the conduct and job performance of an employee based on the supervisor's long-term knowledge of the employee.

We do not require a supervisor to document an employee's behavior in writing. We do, however, provide that any documents generated by the determination must be maintained for one year. Again, the final rule does not require an employer to document each and every reasonable suspicion determination, although an employer would be prudent to do so.

G. Random Testing/Random Testing Rate

The random testing provision generated many comments, with most commenters proposing the adoption of a particular random testing rate or a particular method of determining a random testing rate. Other commenters were concerned about the frequency of random testing and how the test should be administered. Several commenters sought clarification of certain aspects of the provision.

Several different alternatives for determining the random testing rate were offered. Many commenters suggested a flat rate, ranging from 10 percent to 50 percent.

Others suggested a performance-based rate, that is, a rate determined by the results of random testing. Under such a scheme, if the number of results of 0.04 or greater exceeds a specified rate (for example, 1 percent), then the employer would be required to test at a higher specified random rate (for example, 50 percent). If the number of positives is less than the specified rate, the employer would be required to test at a

reduced random rate (for example, 25 percent). One commenter recommended that an employer could randomly test 20 percent of its employees if less than 3 percent of its random tests were positive, but if the number of positives exceeded 3 percent, the employer would have to raise its testing rate.

Other variations were proposed. Several commenters suggested that we set a minimum random testing rate of 10 percent, but give an employer the discretion to test at a higher rate based on its own experience. Another commenter suggested that we require a random rate less than 50 percent and allow an employer to set its own rate for different classes of employees. Yet another commenter recommended that we set a rate anywhere from 10 percent to 50 percent but allow an employer to reduce its rate if it has programs, such as training and rehabilitation programs, in addition to those required by the final rule.

Another commenter recommended that random testing be phased in, 15 percent the first year, 20 percent the second year, and 25 percent thereafter, presumably to ease cost and administrative burdens. Another commenter, however, recommended that those who had never randomly tested employees should be required to test at a higher random rate than those who have had a program in effect. Lastly, one commenter believed that FTA should not set the rate at all, but the rate should be determined by an agreement between labor and management. Aside from the random testing rate issue, commenters also addressed how the test itself should be conducted. In this regard, several commenters were concerned about how truly random testing would be, and suggested that the testing itself should be conducted by an outside agency.

FTA Response. In determining the random alcohol testing rate, FTA has considered not only the comments on this issue but other factors as well. We therefore have established a random alcohol testing rate of 25 percent, the rate at which all DOT agencies issuing rules today are requiring. We recognize, however, that random alcohol testing does subject a large number of employees to testing and is costly. We have thus added a provision to the final rule allowing the random alcohol testing rate to drop to 10 percent annually if, based on the MIS reports, the violation rate for random alcohol testing in the transit industry is less than 0.5 percent for two consecutive years. If subsequently the violation random alcohol testing rate increases to greater than 0.5 percent for any one calendar

year, the random alcohol testing rate would go to 25 percent, and if it increases to greater than one percent, the random alcohol rate would be increased to 50 percent. Each year, FTA will announce the random alcohol testing rate in the **Federal Register**.

Moreover, the NPRM required random testing to be completely random, which means that it must be unannounced. It must also be unpredictable, which is the reason we proposed that the tests be spread reasonably throughout a 12-month period. We have retained both of these requirements in the final rule.

We do not require the test to be conducted by an outside agency. Although requiring a third party to conduct the random alcohol testing may afford an employee additional protection, we believe the final rule provides an employee with sufficient protection. Among other things, the rule requires an employer to use a scientifically valid method to randomly select employees from a pool in which each employee has an equal chance of being selected.

Lastly, although some commenters were confused about when we would require an employer to conduct random alcohol testing, we have retained the NPRM restrictions in the final rule. In the NPRM we proposed to restrict random testing to just before, during, or just after the employee performs a safety-sensitive function because alcohol is a legal substance, and an employee who is not performing or who will not be performing a safety-sensitive function within four hours may engage in a legal activity. Thus the alcohol rule strictly limits the period of time when an employee is subject to random testing. This is particularly important for supervisors who may rarely perform a safety-sensitive function.

H. Post-accident Testing

The comments on this provision concerned three basic questions: when should a test be performed following an accident, which employees should be tested, and who should conduct the testing.

In determining when a post-accident test should be required, the NPRM distinguished between fatal and nonfatal accidents. After an accident involving a fatality, the NPRM required the employer to test employees who were on duty and present in the vehicle at the time of the accident as well as mechanics involved in the vehicle's most recent maintenance. After an accident not involving a fatality had occurred, the employer was required to test certain employees unless their performance could be completely

discounted as a contributing factor to the accident.

Instead of this dual standard in the NPRM, one commenter suggested that we adopt a reasonable cause standard for determining when a post-accident test should be performed, regardless of the seriousness of the accident.

Although other commenters did not specifically propose a reasonable cause standard, they did object to the scope of the fatal accident provision, in which all safety-sensitive employees on-duty and present in the vehicle at the time of the accident, as well as mechanics, must be tested.

Most of the comments on who should be tested stressed the difficulty of testing mechanics, especially when vehicle maintenance is contracted out. Some flatly stated that testing mechanics in rural areas was not practical, while others stated that requiring the testing of mechanics after an accident is unreasonable. While some commenters opposed the testing of any mechanics, others suggested that we include only certain mechanics. In this connection, one commenter suggested that we require the testing only of those mechanics who have maintained the affected vehicle within the two weeks before the accident occurred. Another commenter made the same recommendation but suggested that only those mechanics who maintained the vehicle two days before the accident be tested.

Although most comments concerned the testing of mechanics, one commenter also suggested that we require the testing of drivers only if they are contributorily negligent.

Commenters also stressed the difficulty of testing employees after an accident. They cited examples of employees leaving the scene of the accident, or police or hospital personnel refusing to allow the employee to be tested by the employer. These commenters contended that the rule should address these problems.

FTA Response. FTA in its final rule has developed a dual post-accident testing provision: after accidents involving a fatality, and after accidents involving bodily injury or property damage. The Act requires us to mandate an alcohol test whenever someone dies as a result of a mass transit accident, and we thus have expressly rejected the adoption of a probable cause standard in such cases. Simply put, if an accident involving a fatality has occurred, an alcohol test must be given within 8 hours to those safety-sensitive employees on-duty in the vehicle at the time of the accident.

Other employees' conduct may contribute to an accident, however. For example, if two trains are placed on the same track and collide, the performance of safety-sensitive duties by a vehicle controller could have contributed to the accident. If there are indications that brake failure was involved in a bus accident, and the vehicle's brake system was maintained a brief time before in the garage by an identifiable mechanic, the performance of that mechanic could have contributed to the accident. In situations of this kind, the rule directs the employer to test the other employee, but only if the employer determines, based on the best information available at the time, that the other employee's performance could have contributed to the accident. Implementing this provision rests substantially on the good judgment of the employer. For example, if the performance of the relevant work by a mechanic occurred long enough ago (e.g., more than eight hours before a test could be administered) that a meaningful test could not be administered, the employer would not be expected to administer the test. If the bus was recently in the shop only for an air conditioning repair, there would be no point in testing a mechanic after an accident in which brake failure may have been involved.

With respect to non-fatal accidents involving road surface vehicles (e.g., buses and vans), a covered employee on duty in the vehicle at the time of the accident would have to be tested if the employee had received a citation from a law enforcement officer. As in the case of fatal accidents, the employer would test other employees if the employer determined, based on the best information available at the time, that such an employee's performance could have contributed to the accident. Examples of such a test could include the situation of the mechanics mentioned above and a situation in which a bus driver was not cited by local law enforcement personnel but the employer, in its good judgment, determined that the driver's performance could have contributed to the accident.

With respect to other vehicles (e.g., rail vehicles), the employer would have to test covered employees on duty in the vehicle at the time of the accident, unless the employer determined, based on the best information available at the time, that an employee's performance could be completely discounted as a contributing factor in the accident. This is a different standard than in the case of road surface vehicles, because there is little likelihood of an on-the-spot law enforcement citation to the operator of

vehicles like rail cars. As in the other post-accident testing situations, the employer could make a judgment to test other covered employees, if the employer concluded that their performance could have contributed to the accident.

After an accident has occurred, an employer—not police or hospital personnel—must test affected employees for the misuse of alcohol. The rule does not permit a waiver of the employer's obligation to test an employee after an accident, nor does it allow an employer to use the results of laboratory findings of an alcohol test administered by police, for law enforcement purposes, or hospital personnel for treatment of injury.

Under the final rule, however, an employee may be taken to a medical treatment facility immediately after an accident without being tested by the employer. An employee also may leave the scene of an accident, without being tested, so long as he remains readily available for testing, which means that the employer knows the whereabouts of the employee until he is tested and that the employee is available to be tested immediately after being notified by the employer and within 8 hours of the accident. Thus an employee may receive medical attention or respond to police questions or seek assistance for injured individuals.

I. Return to Duty/Follow-up Testing.

The comments concerning these two kinds of testing focused primarily on the roles of the employer and the Substance Abuse Professional (SAP). The NPRM proposed authorizing the SAP to determine not only when an employee may return to duty after testing at 0.04 or greater, but also how many follow-up tests an employee should take and for what period of time.

Many commenters objected to the extent of authority given to the SAP under the NPRM. An employer, not the SAP, should determine if and when an employee may resume a safety-sensitive function after testing at 0.04 or greater these commenters stated. They also contended that an employer should control the follow-up testing requirements, such as the length of time an employee must submit to follow-up testing and the number of tests the employee must take annually.

Other commenters recommended that the final rule prescribe in detail the follow-up testing requirements, with several offering suggestions. One commenter recommended that the rule require 60 months of follow-up testing, with 12 tests required in the first year and 6 annually thereafter. Another

commenter recommended 60 months of testing with a prescribed number of tests over the entire 60 month period; another a 36 month follow-up period with 6 tests required annually; and another a 24 month follow-up testing period with 3 tests required the first year. And, lastly, one commenter stated that the rule should not recommend a specific number of follow-up tests at all.

FTA Response. The final rule retains the authority of the SAP. In making this decision, we strove to balance the rights and privacy of the employee against the safety of the traveling public. Because of the extensive credentials required to be an SAP, we believe that they are most qualified to make the necessary decisions concerning the ability of an employee to return to his or her safety-sensitive position. In addition, because studies have shown that the relapse rate is highest in the first year of recovery, we mandate a minimum of 6 alcohol tests during that time. After that period, however, we believe that the SAP should determine when follow-up testing should end; in any event, it must end if 60 months have elapsed from the time of the employee's return to duty. We note that an employer may require additional follow-up testing under its own authority. It is important to emphasize, moreover, that during the 60-month period the employee remains separately subject to random testing as well.

J. Treatment

The NPRM proposed that any covered employee who tested at 0.04 or greater must be advised by his employer of the resources available to help him resolve problems associated with alcohol misuse and be evaluated by an SAP. The NPRM neither authorized nor prohibited an employer from disciplining or discharging an employee because he tested at 0.04 or greater; it simply stated that the employee who tests in that range must be removed from his safety-sensitive position.

Several commenters objected to our silence on this issue, and asked us to clarify the rule by specifically authorizing the employer to take whatever disciplinary action the employer deems necessary.

The remaining commenters addressed the issue of rehabilitation. One commenter suggested that we mandate rehabilitation and treatment. Another commenter recommended that the final rule require reinstatement in addition to rehabilitation. Yet another commenter stated that the final rule should not address the issue of rehabilitation, which should be decided by the employer and the union. Lastly, a

commenter stated that an employer should not be required to refer an employee to an SAP when the employer's policy is to discharge any employee who tests at 0.04 or greater.

FTA Response. FTA has retained the language in the NPRM on this issue. We thus remain silent on whether an employer may dismiss or disqualify an employee who has tested at 0.04 or greater, an issue best decided at the local level.

Concerning rehabilitation, we believe that we have met the requirements of the Act, which state that the rule must provide for identification and opportunity for treatment of employees who are determined to have misused alcohol. In this regard, we require that an employee who tests at 0.04 or greater be evaluated to determine whether he needs assistance. Such an employee may return to his safety-sensitive position after he has properly completed a course of treatment as determined by an SAP, and has passed a return to duty alcohol test.

If an employee undergoes treatment, the rule does not address the issue of who should pay for it. We believe that this issue should be decided at the local level. Nor does the rule deal with the issue of recidivism, when an employee has repeatedly tested at 0.04 or greater and has repeatedly been referred to treatment. Again, we believe that issue should be decided at the local level. This rule requires the removal of a safety-sensitive employee from a safety position if the employee tests at 0.04 or greater, but does not address employment or disciplinary issues in connection with such action.

K. Training

The NPRM proposed that supervisors who make reasonable suspicion determinations receive 60 minutes of training on the physical, behavioral, and performance indicators of probable alcohol misuse, which would enable the supervisor to make an informed reasonable suspicion determination. In addition, the NPRM proposed that all safety-sensitive employees be provided educational materials about the effects of alcohol misuse on health, safety, and the work environment.

We received numerous comments on this issue, virtually all of them in favor of requiring training, at least for supervisors. For employees, most commenters were silent, although one favored requiring 60 minutes of training and another asked that we help develop a curriculum for a general educational program.

Because almost all of the commenters were in favor of training for supervisors,

many commenters proposed certain training specifications. Some commenters proposed a combined drug and alcohol training program; one commenter specifically recommended four hours of combined drug and alcohol training, while another made the same recommendation but added a one-hour yearly refresher course.

The remaining commenters did not specifically recommend that the drug and alcohol training be combined. Instead, one commenter suggested that supervisors be required to receive four hours of training and that the class size be limited to four individuals. Other commenters recommended a full day of training, one suggesting that supervisors should be certified after satisfactorily being trained. Lastly, several commenters stated that we should require interactive training.

FTA Response. FTA believes that training will greatly improve the efficacy of the alcohol misuse prevention program, and we agree with the commenters who favor a training requirement for supervisors. We note, however, that most of the comments addressed one of two areas, the amount of training required and the actual content of the program itself.

Although most commenters recommended that we increase the amount of training for supervisors who make reasonable suspicion determinations, we have not done so in the final rule. We believe that one hour of training is sufficient to train supervisors who may make reasonable suspicion determinations to recognize the signs and symptoms of alcohol misuse; moreover, an employer may, at its own discretion, choose to provide additional training. These requirements are one-time only; the final rule does not require annual or recurring training, although an employer certainly is not prohibited from providing any additional training. Moreover, we do allow employers to combine drug and alcohol training providing that the minimum time requirements are observed.

Nor does the final rule specify the content of the training programs, since an employer should develop a program to meet its own needs. We believe that it would be inappropriate for the rule to specify the content of this kind of training program. The employer best knows its workforce and the needs of its employees.

L. Management Information System (MIS) Reporting Requirement

The vast majority of comments on this issue concerned the State's role in record collection. Under the NPRM, we

proposed to require States to collect and forward to FTA the annual reports prepared by their subrecipients. Because the State merely "passes through" the Federal grant funds to a subrecipient, most commenters believed that the State should not be responsible for ensuring the accuracy of the information collected, nor for submitting the reports to the FTA on time. In fact, one commenter suggested that only large employers should be required to keep and submit detailed information on test results.

Some States focused on the overlap between this NPRM and a rulemaking required under section 28 of the FT Act, which requires certain States to oversee the safety of certain kinds of fixed guideways. Some commenters explained that they would not be able effectively to oversee certain fixed guideway systems unless they were given access to the records generated under this rule.

Finally, some commenters asked that we provide States an extra 60 days from the annual February 15th reporting date.

FTA Response. In the final rule we have retained the requirement that a State collect and submit to FTA on behalf of its subrecipients the data required under this rule. This requirement is consistent with the fundamental legal relationship between FTA and the direct recipient of Federal funding, which in some instances is a State, in which case the State must collect and submit the annual report required under this rule and meet the same reporting deadline as other recipients. The due date of the annual report has been changed to March 15. A State must collect the reports prepared by its subrecipients and their contractors, as appropriate, and forward them to the FTA.

The final rule includes two different reporting forms, FTA Alcohol Testing Management Information System (MIS) Data Collection Form (Appendix B) and FTA Alcohol Testing Management Information System (MIS) "EZ" Data Collection Form (Appendix C). Appendix B must be used in reporting all alcohol test results of 0.02 or greater; Appendix C must be used by employers who have no test results of 0.02 or greater to report.

FTA intends to combine the drug and alcohol regulations' reporting forms within two to three years after implementation.

We appreciate those comments directing our attention to the potential overlap between this rule and the State Safety Oversight NPRM published in the Federal Register on December 9, 1993 at FR 64856. We have amended those

provisions requiring access to certain facilities to also permit access by State oversight agency officials to facilitate their oversight role as proposed in the State Safety Oversight NPRM.

M. Implementation Date

The NPRM proposed to require compliance with this rule within one year of publication in the Federal Register for large employers and within two years for States and small employers. This provision contrasted with implementation periods proposed in the drug NPRM, which were six months for large employers and one year for States and small employers.

Several commenters strongly favored implementing both the drug and the alcohol rules simultaneously. Another commenter recommended that, for budgeting reasons, FTA key the implementation period to the fiscal year.

FTA Response. In the final rule, we have decided that large employers must implement their alcohol testing programs on January 1, 1995, while small employers will have until January 1, 1996. This is consistent with the implementation date of our related drug rule and will ensure that the MIS annual report data collection effort will coincide with the calendar year.

We provide small employers additional time to implement their rule because they may find it necessary to form consortia. Large employers in many instances already have experience in testing their employees for alcohol misuse.

We further note, in response to several inquiries, that the rule provides no authority for employers to begin its program before the implementation dates included in this rule.

N. Combined Drug and Alcohol Rules

Many commenters urged us to combine the drug and alcohol NPRMs into one final rule, or, in the alternative, to combine common aspects of both rules, such as the training and reporting requirements.

FTA Response. We have decided not to combine the drug and alcohol testing rules at this time because there are significant differences between them. For instance, the random rate for the two rules differ, 25 percent for alcohol and 50 percent for drugs. Also, the time period during which an employee may be subject to random testing differs in the two rules. The alcohol rule contains an entire subpart, Prohibitions, which specifies when an employee cannot use alcohol. In contrast, the drug rule contains no comparable subpart because prohibited drugs are controlled

substances. On the other hand, we do allow an employer to combine certain aspects of the rules, most notably the training requirements. In addition, we encourage the employer to formulate and promulgate one policy statement concerning both drugs and alcohol.

O. Indian Tribal Governments

Several commenters have asked us to clarify the applicability of the rule to Indian tribal governments and have suggested that we preempt Indian tribal law. Because Indian tribal governments are not subject to State law or regulation, these commenters are concerned about the ability of a State section 18 recipient to require an Indian tribal government subrecipient to comply with this regulation.

FTA Response. As a general matter, statutes apply to Indian Nations or tribes unless (1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended the law not to apply to Indians on their reservations, *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985).

In this regard, there is no legislative history indicating congressional intent not to apply the Act to Indian tribes. We have no information, moreover, on the issues addressed in points one and two. In the absence of any such information, we conclude that the Act would preempt Indian tribal law but of course would consider any arguments to the contrary based on points one and two.

We stress that compliance with the rule is a condition of Federal funding, which means that an Indian tribal recipient or operator would have to comply with this rule if it wanted to receive the benefits of Federal transit assistance. On the other hand, should a particular Indian tribe object to drug or alcohol testing, it could simply choose not to receive Federal funding.

P. Waivers

Several commenters have asked us to waive the application of the rule to certain categories of employers. For instance, one commenter recommended that employers with less than 16 employees be excluded from complying with the rule. Another recommended that any section 18 recipient certifying that it has not had an alcohol or drug related accident in three years should be exempted from the rule.

FTA Response. Language in a report of the Senate Committee on Commerce, Science, and Transportation

accompanying the Act addressed the issue of FTA granting waivers of the rule in whole or in part:

The Committee is aware of concerns raised with regard to the difficulties some believe may be faced by small transit operations located in rural areas in complying with [FTA] drug and alcohol testing requirements. If, after notice and opportunity for comment, the Secretary determines that a waiver for certain operations from such requirements would not be contrary to the public interest and would not diminish the safe operation of rural transit conveyances, the committee would not object to a waiver, in whole or in part, of the application of regulations issued pursuant to this bill with regard to recipients of funds under section 18 of the [Federal Transit Act, as amended]. S. Rep. No. 80, 102d Cong., 1st Sess. 36 (1991).

Notwithstanding this legislative history, the Act itself does not specifically authorize the FTA to "waive" particular requirements of the rule. Nonetheless, we believe we can implement the rule in such a way that it minimizes burdens on small operators.

In this regard, we have adopted several provisions to ease the rule's impact on small operators. Small operators, which includes section 18 rural providers and smaller recipients of section 9 formula funds—are provided additional time to comply with the rule. We have also exempted from the rule mechanics under contract to or with informal agreements with a section 18 employer. To reduce costs and administrative burdens we allow and encourage section 18 providers to join a consortium of operators to comply with the rule.

IV. Section-by-Section Analysis

Subpart A—General

A. Purpose. (§ 654.1)

This section explains that the purpose of the rule is to promote safety by requiring a recipient to establish and implement an alcohol testing program to detect the misuse of alcohol, by breath testing, and to deter the misuse of alcohol by educating and training safety-sensitive employees about the safety and health ramifications of alcohol misuse.

B. Applicability. (§ 654.3) This section describes FTA's jurisdiction over recipients and covered employees and how it may overlap with that of other modal agencies; whether section 16(b)(2) recipients must comply with this rule; the effect of the rule on user-side subsidies; and the effect of the rule on those who may no longer receive FTA funding.

1. *FTA grant programs under sections 3, 9, and 18 and the Interstate Transfer Program.* Under the section 3 discretionary grant program, FTA funds three categories of capital projects: the construction of new rail projects; the improvement and maintenance of existing rail and other fixed guideway systems; and the rehabilitation of bus systems. Under sections 9 and 18, the formula grant programs, FTA funds both capital and operating assistance to specific categories of recipients that receive Federal funds under a statutory formula based on population, population density, and other factors. Generally, urbanized areas receive section 9 funding directly, while nonurbanized areas receive section 18 funding through the State.

FTA also provides funds under 23 U.S.C. section 103(e)(4), the interstate transfer program. Under this program, FTA provides funding to States and localities for capital transit projects in lieu of nonessential interstate highway projects. Hence, recipients of these types of FTA funding may be States, transit agencies, or other kinds of localities, but all such recipients are public entities.

2. *FTA jurisdiction.* FTA is a Federal agency that makes grants of Federal financial assistance under various statutory provisions. Under all of these provisions, the agency's relationship is with the direct receiver of Federal financial assistance, the recipient. Such a recipient of Federal funds must comply with a variety of Federal requirements, including this rule, and enters into a grant agreement with the FTA to that end. After accepting a grant from the FTA, a recipient is responsible for ensuring that it, or any entity that it uses to provide mass transportation services, will comply with all relevant Federal requirements.

While the Act requires us to issue this alcohol testing rule, it does not change the fundamental relationship between FTA and a direct recipient of Federal financial assistance.

That is, FTA does not directly regulate covered employees, which means that FTA has no authority directly to deal with a covered employee under any circumstances.

Rather, the Act authorizes FTA to require a recipient to implement an alcohol misuse prevention program, and it is the recipient that is responsible for assuring that covered employees comply with the rule. If a recipient fails to do so, FTA will withhold Federal funding.

3. Multi-modal jurisdiction. As discussed below, recipients may be regulated by another DOT modal agency such as the Federal Railroad Administration (FRA), which regulates railroads, the Federal Highway Administration (FHWA), which regulates holders of Commercial Driver's Licenses (CDL) and their employers, or the United States Coast Guard, which regulates certain vessels and mariners.

Both FRA and FHWA are authorized under the Act to establish an alcohol testing program for their respective regulated communities, which include some FTA recipients. Coast Guard has jurisdiction over mariners and vessels, including the authority to take action against a seaman based on alcohol intoxication.

Coast Guard's regulated community also includes some FTA recipients. Therefore, to clarify the jurisdiction between FTA and other DOT agencies, we have reached the following agreements with the relevant agencies.

a. Federal Railroad Administration. The FRA regulates railroads. A railroad is defined under the Federal Railroad Safety Act of 1970 as [a]ll forms of non-highway ground transportation that run on rails or electromagnetic guideways, including (1) commuter or other short-haul rail passenger service in a metropolitan or suburban area, as well as any commuter rail service which was operated by the Consolidated Rail Corporation as of January 1, 1979, and (2) high speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads. Such term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation.

45 U.S.C. 431(e)(1988).

If an FTA recipient solely operates a commuter railroad, those railroad operations are subject to FRA's alcohol rule. Such a recipient must certify to the FTA that it complies with FRA's rule as provided for under § 654.83 of this part. See Appendix A for the certification such a recipient must execute.

If a recipient operates a railroad as well as other mass transit services, its railroad operations are subject to FRA's rule while its non-railroad mass transit operations are subject to the FTA rule.

b. Federal Highway Administration. The Act authorizes FHWA to regulate intrastate motor carriers and specifically requires it to issue an alcohol rule which applies to intrastate as well as interstate motor carriers. Thus, to avoid subjecting recipients who are also motor carriers to two different rules, FTA and FHWA have agreed that these recipients are subject only to FTA's alcohol rule.

c. United States Coast Guard. If a recipient operates a ferry boat service, it is subject to both FTA's and Coast Guard's alcohol misuse regulations with regard to the ferry boat service. Applicable Coast Guard regulations are located in 33 CFR part 95 and 46 CFR parts 4 and 16. FTA and Coast Guard agree, however, that a recipient in compliance with FTA's alcohol misuse prevention rule will also probably be in compliance with the relevant Coast Guard provisions.

It is important to note that Coast Guard's regulations require alcohol testing in only one situation, when there has been a serious marine incident. Serious marine incidents include large oil or hazardous substance spills and reportable marine casualties which result in (1) One or more deaths; (2) serious injuries; (3) damage to property in excess of \$100,000; (4) loss of an inspected vessel; or (5) loss of a self-propelled uninspected vessel over 100 gross tons.

Under Coast Guard's regulations, a test must be conducted by using blood or breath specimens. Use of an FTA-required EBT would satisfy the Coast Guard requirement. Because FTA has defined accident more broadly than Coast Guard, an FTA recipient who performs a post-accident breath test under FTA's rule should be in compliance with Coast Guard's rule as well.

Coast Guard also allows employer or law enforcement officer to direct reasonable cause testing under situations specified in 33 CFR part 95. We believe that this provision represents only a minor difference from FTA's rule.

We note here that the Coast Guard is authorized to take certain actions against a marine employer or a mariner. FTA's rule does not affect Coast Guard's authority or requirements in any respect. Consequently, a recipient that operates a ferry boat service is subject to withholding of Federal funding if it is in non-compliance with FTA's rule, and any appropriate action if it is in non-compliance with the Coast Guard rule.

4. Covered employees of recipients. As noted above, FTA does not directly regulate employees or workers who are subject to the provisions of this rule

through action of their employers. This general proposition is not true of FHWA and the Coast Guard, which use licensing actions or other measures to enforce their safety rules, which would include their alcohol rules. A recipient's safety-sensitive employees thus may be subject to licensing actions of these agencies, even though the recipient is regulated by FTA and its employees are covered only by FTA's alcohol regulations. For example, a CDL holder employed by an FTA recipient remains subject to the Commercial Motor Vehicle Safety Act of 1986, and the consequences that attach to a violation of it. For example, a CDL holder convicted of driving under the influence of drugs or alcohol may have his or her Commercial Driver's License suspended or revoked. Similarly, the Coast Guard is authorized to revoke a license, certificate, or document of a marine employee under certain circumstances. Coast Guard's relevant provisions specifying the rights and responsibilities of marine employees are located in 46 CFR parts 4, 5, and 16 and 33 CFR part 95.

5. Section 16(b)(2) recipients. Some entities receive funding under section 16(b)(2) of the FT Act, which provides capital assistance, through a State, to organizations that provide specialized transportation services to elderly persons and persons with disabilities.

While some commenters suggested that we cover section 16(b)(2) recipients under the rule, we do not do so, noting that the Act references recipients of funds under sections 3, 9, or 18 of the FT Act or section 103(e)(4) of title 23 of the U.S. Code, but not section 16. Note, however, that a section 16(b)(2) recipient may be covered by the alcohol regulation published by the FHWA elsewhere in today's Federal Register.

6. User-side subsidies. A user-side subsidy refers to the practice of providing passengers publicly subsidized script or vouchers, which the passenger then uses to pay for transportation from a private carrier such as a taxicab company. In essence, a recipient provides transportation services indirectly through such subsidies.

The regulation applies to certain recipients of FTA funding, and to transit operators providing service under contract or other arrangements with those recipients. To the extent that a taxi operator does not provide service under an arrangement with an FTA recipient, but is chosen at random by the passenger, it would not be subject to the rule. If, however, the taxicab company or private operator does provide service under an arrangement

with an FTA recipient, it is covered by the rule as a contractor, as defined by the rule. In such cases, the taxi company may wish to designate only certain drivers to provide such service, in which case only those designated drivers would be subject to the rule's alcohol testing program.

7. *Continuing Federal interest.* Not all recipients receive a Federal grant or grants for capital or operating assistance each year under the formula or discretionary programs. Some may receive capital assistance only when they need to purchase equipment or construct or repair a facility, which could occur once every few years. Indeed, there may be a recipient that receives a capital grant just once over a five or ten year period. It is important to emphasize in these cases that once a recipient has received an FTA capital grant after the effective date of this rule and has therefore agreed to comply with the rule, it must continue to comply with the rule (and other Federal requirements) during the useful life of the equipment or facility funded under the grant. In short, this rule remains in effect so long as the grant-acquired assets and related grant obligations remain in effect, and is not contingent upon a recipient receiving Federal funds each year.

This is not the case with operating assistance, however, which essentially is "used up" each year and is not considered to have a useful life beyond any given year. Thus in the event a recipient receives an operating assistance grant just once (and has not separately received a capital grant), it would only have to comply with this rule for that one year. This is probably a hypothetical example, however, since most recipients receive operating assistance on an annual basis, while others receive capital funding at some point, in which case they would have to comply with the rule over the life of the grant-acquired asset.

D. Alcohol Testing Procedures. (§ 654.5)

This section mandates compliance with the alcohol testing procedures in 49 CFR part 40, a separate rulemaking document published elsewhere in today's issue of the Federal Register.

E. Definitions. (§ 654.7)

1. *Accident.* An accident may trigger a post-accident alcohol test, and is defined as an incident in which a person has died or is treated at a medical facility or when there has been property damage resulting in the towing of a vehicle or the removal of a transit vehicle from revenue service.

For accidents not involving a fatality, we have created two categories of vehicles. The first is for "road surface" vehicles, including buses, vans, automobiles, and electric buses. For this category, an accident is an occurrence resulting in a vehicle—either a mass transit vehicle or another vehicle—suffering disabling damage and having to be towed away. This definition parallels that used by FHWA for commercial motor vehicle accidents, and includes language drawn from FHWA's regulations specifying what kind of damage is viewed as disabling.

The second category includes rail cars, trolley buses and trolley cars, and vessels. This category would also include other kinds of transit conveyances operated by FTA recipients, such as people movers, inclines, and monorails. An accident is deemed to occur to such a vehicle when the occurrence results in the vehicle being removed from revenue service. FTA views an accident happening when the vehicle is not operating in revenue service (e.g., an accident that occurs in a rail yard) as falling within this definition if it results in damage that would result in a comparable vehicle being withdrawn from revenue service or results in a delay in the vehicle being returned to revenue service.

2. *Administrator.* Administrator means the Administrator of the Federal Transit Administration or the Administrator's designee.

3. *Alcohol.* For a general discussion of this definition, see the common preamble and the preamble to part 40 issued by the Office of the Secretary, published elsewhere in today's Federal Register.

4. *Alcohol concentration.* For a general discussion of this definition, see the common preamble and the preamble to part 40 issued by the Office of the Secretary, published elsewhere in today's Federal Register.

5. *Alcohol use.* For a general discussion of this definition, see the common preamble and the preamble to part 40 issued by the Office of the Secretary, published elsewhere in today's Federal Register.

6. *Certification.* This definition describes the statement that must be executed by the recipient.

7. *Confirmation test.* For a general discussion of this definition, see the preamble accompanying part 40 of this title, Procedures for Transportation Workplace Drug and Alcohol Testing Programs, published elsewhere in today's Federal Register.

8. *Consortium.* This definition describes an arrangement in which employers place their safety-sensitive

employees in a pool with the safety-sensitive employees of other employers. Any employer subject to any DOT agency alcohol misuse regulation may join a consortium for the purpose of complying with the rule. It may be particularly advantageous for smaller entities to join a consortium and thereby limit costs and administrative burdens.

9. *Contractor.* This definition covers a broad range of arrangements between an FTA recipient and those carrying out services for it and includes not only written and oral commitments in which both parties agree to specific terms and conditions but informal arrangements as well. An informal arrangement essentially is any ongoing relationship between two parties. Hence, repeatedly doing business with another entity would come within the meaning of a contractual arrangement under the rule.

10. *Covered employee.* This definition describes who is subject to the rule. Only safety-sensitive employees that work for a recipient or any entity performing a mass transit function on behalf of a recipient are covered by the rule, except for contract mechanics for small operators, which are not covered.

11. *DOT.* The abbreviation DOT stands for the United States Department of Transportation.

12. *DOT agency.* DOT contains several operating agencies, five of which are issuing alcohol misuse prevention rules in today's issue of the Federal Register. Those agencies are: FHWA (49 CFR part 350), FRA (49 CFR part 219), FAA (14 CFR part 61), and RSPA (49 CFR part 654).

13. *Employer.* This definition applies to entities that must implement an alcohol misuse rule. It includes recipients and other entities that provide mass transit service or perform a safety-sensitive function for a recipient. It includes subrecipients, operators, contractors, and consortia.

14. *FTA.* FTA is the abbreviation for the Federal Transit Administration.

15. *Large operator.* A large operator is a transit provider primarily operating in an area of 200,000 or more in population.

16. *Performing (a safety-sensitive function).* For a general discussion of this definition, see the common preamble issued by the Office of the Secretary, published elsewhere in today's Federal Register.

17. *Railroad.* This definition is from the Railroad Safety Act of 1970 and is used in the rule to distinguish FTA's jurisdiction from FRA's. Basically, FRA has jurisdiction over any form of transportation that runs on rails and is connected to the general railroad system. FTA thus has jurisdiction over

all self-contained forms of mass transportation that run on rails, so long as those systems receive Federal funding from the FTA under sections 3, 9, or 18 of the FT Act or section 103(e)(4) of title 23 of the U.S. Code.

18. *Recipient.* This definition, based on the Act, defines a recipient as an entity receiving Federal financial assistance directly from the FTA under section 3, 9, or 18 of the FT Act or section 103(e)(4) of title 23 of the U.S. Code.

19. *Refuse to submit.* For a general discussion of this definition, see the common preamble as well as part 40 of this title, Procedures for Transportation Workplace Drug and Alcohol Testing Programs, published elsewhere in today's Federal Register.

20. *Safety-sensitive function.* This definition determines which categories of employees are subject to the rule. Because each recipient uses its own terminology, we have decided to define safety-sensitive based on the function performed instead of listing specific job categories. Each employer must decide for itself whether a particular employee performs any of the functions listed in this definition.

The definition lists five categories of safety-sensitive functions. The list itself is exclusive, which means that either an employee performs a safety-sensitive function listed in a category or she does not. An employer may not add any category to the list unless it wishes to test those additional employees separately under its own authority.

The first category is operating a revenue service vehicle, whether or not the vehicle is in service. In short, an employee who operates a revenue service vehicle for any purpose whatsoever is a safety-sensitive employee and is subject to the rule.

The second category is operating a nonrevenue service vehicle when required to be operated by a holder of a CDL. The third category is controlling dispatch or movement of a revenue service vehicle or equipment used in revenue service.

The fourth category is maintaining a revenue service vehicle unless the recipient receives section 18 funding and contracts out such services. Maintaining a revenue service vehicle includes any act which repairs, provides upkeep to a vehicle, or any other process which keeps the vehicle operational. It does not include cleaning either the interior or the exterior of the vehicle or transit facility. This category specifically excludes only the employees of a contractor or other entity who maintains revenue service vehicles for section 18 recipients. Hence, all

other employees who maintain revenue service vehicles whether by contract or otherwise are safety-sensitive employees.

The fifth category is carrying a firearm for security purposes. A security guard who does not carry a firearm is excluded from this category, and is not a safety-sensitive employee.

We note that supervisors are included in this definition so long as the supervisor performs or the supervisor's job description includes the performance of any of the functions listed in categories 1 through 5.

21. *Screening test.* For a general discussion of this definition, see the preamble accompanying Part 40 of this title, Procedures for Transportation Workplace Drug and Alcohol Testing Programs, published elsewhere in today's Federal Register.

22. *Small operator.* A small operator is a recipient operating primarily in an area of less than 200,000 in population.

23. *Substance abuse professional.* For a general discussion of this definition see the common preamble published by the Office of the Secretary, published elsewhere in today's Federal Register.

24. *Vehicle.* This definition lists types of vehicles used in mass transportation, or which may be involved in accidents with such vehicles. Because mass transit encompasses travel by bus, van, ferry boat, and rail, the list is meant to be very broad, covering every type of conveyance used to provide mass transit (including such things as people movers and inclines). The term "mass transit vehicle" is used to distinguish vehicles actually used for transit purposes from those used by the general public.

25. *Violation rate.* For a general discussion of this definition, please see the common preamble issued by the Office of the Secretary, published elsewhere in today's Federal Register.

F. Preemption of State and Local Laws. (§ 654.9).

The Act provides that this rule preempts any inconsistent State or local law, ordinance, rule, regulation, standard, or order.

Consistent with long-standing Department-wide interpretation of this type of preemption language, the regulation specifies that "inconsistent with" means that the regulation:

(1) Preempts a State or local requirement if compliance with the local requirement and the FTA regulation is not possible; or

(2) Preempts a State or local requirement if compliance with the local requirement is an obstacle to accomplishing the provisions of the FTA regulation.

On the other hand, neither the statute nor the regulation preempts State criminal laws that impose sanctions for reckless conduct.

G. Other Requirements Imposed by an Employer. (§ 654.11)

An employer may impose other requirements in addition to those imposed by this rule if those additional requirements do not conflict or interfere with the requirements of this rule. For example, an employer may require a supervisor to be trained for two hours instead of one, or an employer may provide training for employees.

H. Requirement for Notice. (§ 654.13)

This section requires an employer to notify an employee that the employee is being tested under Federal law. This section specifically bars an employer from misrepresenting a test conducted under its own authority as a test mandated by Federal law.

I. Starting Date for Alcohol Testing Programs. (§ 654.15)

This section states the implementation date for large operators, States, and small operators.

Subpart B—Prohibitions

This subpart identifies the acts prohibited by the rule. Although the rule text addresses the employer, we believe these sections are best understood if they are directed to the employee.

A. Alcohol Concentration. (§ 654.21)

This section sets the alcohol concentration level prohibited by the rule at 0.04. A covered employee may not perform a safety-sensitive function when his or her alcohol concentration level is at 0.04 or greater.

B. On-duty Use. (§ 654.23)

This section prohibits a covered employee from consuming alcohol while performing a safety-sensitive function.

C. Pre-duty Use. (§ 654.25)

Paragraph (a) prohibits employees from consuming alcohol four hours before performing a safety-sensitive function.

For on-call employees, the employer must prohibit a covered employee from using alcohol within four hours of performing a safety-sensitive function, and must establish a procedure that allows an employee to: (1) Say he has used alcohol and (2) indicate whether he is able to perform his safety-sensitive function. If the employee believes he is not capable of performing his safety-

sensitive function, the employer shall excuse the employee from doing so. If, however, the employee believes he is capable of performing a safety-sensitive function, the employer shall test the employee and shall permit the employee to perform a safety-sensitive function if his alcohol concentration level measures less than 0.02. If an employee's alcohol concentration level measures at 0.02 or greater but less than 0.04, the employer may allow the employee to perform his safety-sensitive function only if he is retested and his alcohol concentration level measures less than 0.02. If an employee is not retested, he must wait until eight hours has elapsed before resuming the performance of a safety-sensitive function.

To encourage employees to admit that they have consumed alcohol, they shall not be subject to the consequences specified in subpart E. If, however, an on-call employee does not indicate that she has consumed alcohol and exhibits signs of alcohol misuse, she may be subject to reasonable suspicion testing. If the test indicates an alcohol concentration level at 0.04 or greater she would be subject to the consequences of violating this rule.

D. Use Following an Accident. (§ 654.27)

This section prohibits an employee from consuming alcohol after an accident until she has been tested, eight hours have elapsed, or if an employee's conduct is completely discounted as a contributing factor to the accident. In the case of fatal accidents, the covered employee on duty in the vehicle at the time of the accident must refrain from drinking for eight hours or until she has been tested, whichever occurs first.

E. Refusal to Submit to a Required Alcohol Test. (§ 654.29)

If an employee refuses to submit to a random, post-accident, reasonable suspicion, or follow-up test, he is treated as if he tested at 0.04 or greater and subjected to the consequences established in subpart E.

Subpart C—Tests Required

A. Pre-employment Testing. (§ 654.31)

This section requires an employer to administer a pre-employment alcohol test to applicants and employees transferring from a nonsafety-sensitive position to a safety-sensitive position.

This section, however, does not preclude an employer from hiring an applicant before the administration of an alcohol test. Nor does this section preclude an employer from hiring an applicant who has taken an alcohol test

indicating an alcohol concentration level of 0.04 or greater. It states that before an employee performs a safety-sensitive function, an employee must take an alcohol test with a result indicating an alcohol concentration level less than 0.04.

This section also applies to current employees transferring from a nonsafety-sensitive position to a safety-sensitive position. Similarly to an applicant, the transferee must take an alcohol test prior to the first time she performs a safety-sensitive function with a result indicating an alcohol concentration level less than 0.04.

If an applicant's or a transferee's alcohol concentration level measures at 0.02 or greater but less than 0.04, they cannot perform a safety-sensitive function until their alcohol concentration level measures less than 0.02. The employer, therefore, may opt to retest them until their alcohol concentration level measures less than 0.02 or not to allow them to perform a safety-sensitive function for eight hours.

Paragraph (b) of this section allows the employer to waive, under very limited circumstances, the administration of a pre-employment test. A test may be waived when (1) the applicant or transferee has been tested within the previous six months under the requirements of another DOT agency's alcohol misuse prevention rule; and (2) the employer ensures that no prior employer has knowledge or records of an employee's violation of an alcohol misuse rule within the previous six months. This section requires an employer to contact prior employers seeking this information.

If an employer does not wish to seek this information, it may choose to administer a pre-employment test.

B. Post-accident Testing. (§ 654.33)

This section requires a test after an accident has occurred, and establishes two categories of accidents, fatal and nonfatal. Nonfatal accidents are treated differently depending on the type of transit vehicle involved. For a more complete description of the ways in which different kinds of accidents are treated, please refer to the discussion of post-accident testing in the portion of the preamble that responds to comments.

The rule requires an employer to test the appropriate covered employees as soon as possible, but within 8 hours of the accident.

The rule also requires an employer to require an employee to remain readily available for testing; if the employee does not do so, the employer can treat such behavior as refusing to submit to

an alcohol test. Remaining readily available means that the employer knows the whereabouts of the employee and must conduct the test as soon as practicable but within 8 hours of the accident.

This section allows an employee to seek medical attention, assist injured individuals, or obtain assistance in dealing with the accident if necessary before being tested for misusing alcohol.

C. Random Testing. (§ 654.35)

The rule requires an employer to randomly test covered employees for the misuse of alcohol. The testing must truly be random, which means that it is random with respect to the person tested and the predictability of the actual administration of the test.

An employer cannot use an employee's name in a random selection pool. Rather, an employer must identify each covered employee by a unique number, such as a social security or a payroll identification number, which is entered into a pool from which the selection is made. Each covered employee must have an equal chance of being tested. Once a covered employee is selected and tested, their identification number is reentered into the pool so that they will have an equal chance of being tested the next time the employer conducts random testing.

An employer must test randomly throughout the calendar year. Testing must be unannounced and occur on a reasonable basis throughout the entire calendar year. Random tests must be conducted in an unpredictable fashion. For example, an employer may not conduct random tests only on a Monday or only at the beginning of a shift. Further, once an employee is notified of his selection for a random test, he must report (or be escorted) immediately to the collection site.

This section also describes the random alcohol testing rate which is based on the number of test results indicating an alcohol concentration of 0.04 or greater in the transit industry and thus may be decreased or increased on the basis of data made available to FTA. The rule requires employers to randomly test at a minimum annual rate of 25 percent, which means that the number of tests to be administered during a year must be equal to 25 percent of the number of employees in the selection pool. Based on the data FTA receives, however, the rate may be lowered to 10 percent if the positive random alcohol rate of the transit industry is less than 0.5 percent per year for two consecutive years. If the rate is lowered, it may subsequently be increased to 50 percent if the transit

industry positive random alcohol rate is equal to or greater than one percent for one year. FTA will publish a Notice in the *Federal Register* annually announcing the random alcohol testing rate. We emphasize that the rate is calculated and implemented industry-wide, and not on the basis of any individual employer's rate.

For compliance purposes, it is important to note that in calculating its positive random alcohol testing results an employer must include a refusal to submit to a test as an alcohol test result of 0.02 or greater.

This section establishes definite periods of time an employee may be randomly tested for alcohol, just before, during, and just after performing a safety-sensitive function.

D. Reasonable Suspicion Testing. (§ 654.37)

This section establishes testing based on reasonable suspicion that an employee has misused alcohol and establishes the standard the employer must use in determining whether to conduct such a test. First, a supervisor, trained in detecting the signs and symptoms of alcohol misuse must observe the employee's appearance, behavior, speech, and body odors for signs of alcohol misuse. Then the trained supervisor determines, based on specific, contemporaneous, and articulable observations, whether the employee must take a reasonable suspicion alcohol test.

This standard precludes the use of long term indicators of alcohol misuse such as absenteeism, tardiness, occupational injuries, or moving traffic or operating rule violations as a basis for a reasonable suspicion determination.

Although the observation and determination must be made by a supervisor trained in the signs and symptoms of alcohol misuse, this standard does not preclude the use of observations made by third parties such as passengers. Should a passenger believe, however, that an employee has misused alcohol, a trained supervisor should observe the employee first hand and decide whether a reasonable suspicion test is warranted.

This section limits the period of time the trained supervisor may observe the employee for signs and symptoms of alcohol misuse to just before, during, or just after the employee performs a safety-sensitive function and limits the time frame for the employer to decide that a reasonable suspicion alcohol test is necessary to these time periods as well.

Once a reasonable suspicion determination is made, paragraph (d)

requires the employer to conduct a reasonable suspicion alcohol test. If, for some reason a test cannot be administered after a reasonable suspicion determination, paragraph (d) gives the employer two options. The employer can wait for eight hours to elapse before allowing an employee to perform a safety-sensitive function, or the employer can administer an alcohol test sometime during the eight hours. In any event, if a test is not conducted within two hours the employer must record why it was not conducted. If it was not conducted within eight hours, the employer must also record the reasons for that failure. The employer must maintain these records and submit them to the FTA upon request.

When an employee is not given a reasonable suspicion test, this paragraph precludes an employer from applying the consequences established in subpart E for a violation of the rule.

E. Return to Duty Testing. (§ 654.39)

This section requires an employee who has violated a prohibition of Subpart B to take a return to duty test. The employee may not perform a safety-sensitive function until she has taken a return to duty test indicating that her alcohol concentration level is less than 0.02.

In addition, because of the prevalence of combined drug and alcohol misuse, an employer may also subject an employee who previously tested at 0.04 or greater under the FTA alcohol rule to a return to duty drug test.

F. Follow-up Testing. (§ 654.41)

Upon taking a return to duty test with a result less than 0.02, an employee is subject to follow-up testing for up to 60 months. During the first 12 months the employee is subject to a minimum of 6 follow-up alcohol tests, which must be unannounced and conducted reasonably throughout the 12 months.

After those 12 months, the substance abuse professional determines whether the employee should be subject to follow-up testing for the remaining 48 months. Because many individuals abuse more than one substance at a time, an employer may, based on the recommendations of the SAP, subject an employee who previously tested at 0.04 or greater under the FTA alcohol rule to follow-up testing for the use of prohibited drugs. An employer may also subject an employee who previously failed to pass a drug test under part 653 to follow-up testing for the misuse of alcohol.

Like reasonable suspicion and random testing, follow-up testing must be conducted just before, during, or just

after the employee performs a safety-sensitive function.

It is important to note that an employee subject to follow-up testing remains separately subject to random testing under this rule.

G. Retesting of Covered Employees With an Alcohol Concentration of 0.02 or Greater but Less Than 0.04. (§ 654.43)

This section applies when an employee has taken an alcohol test showing an alcohol concentration level of 0.02 or greater but less than 0.04. When this happens the consequences of subpart E do not apply. The employee, however, may not perform a safety-sensitive function with this amount of alcohol in his system. The rule provides, therefore, that the employer may opt to retest the employee or prohibit him from performing a safety-sensitive function for eight hours. If an employer selects the first option and retests the employee, the employee may perform a safety-sensitive function only if on retest his alcohol concentration level measures less than 0.02. If the employer elects to do so, it may conduct several tests until the employee's alcohol concentration level measures less than 0.02.

Subpart D—Administrative Requirements

A. Retention of Records. (§ 654.51)

Section 654.51 explains which records relating to the alcohol testing program must be retained and for how long.

The rule provides for three separate record retention periods for different types of records, five years, three years, and one year. Each employer must maintain for five years records of covered employees' alcohol test results of 0.02 or greater, documentation of refusals to take an alcohol test, and covered employee referrals to the SAP. Collection process and employee training documents must be retained for two years, while records of test results less than 0.02 must be retained for one year.

B. Reporting of Results in a Management Information System. (§ 654.53)

The reporting requirements required in section 654.53 are part of a Department-wide effort to standardize reporting for alcohol testing, by establishing a Management Information System (MIS). The data collected will be used by FTA and DOT to identify trends, to determine the random alcohol testing rate, and to assess the success or failure of the agency's regulatory program.

The data elements were selected to provide information on the scope of the program, the prevalence of alcohol misuse in mass transportation, the implementation of the program, and the deterrent effect of the rules over time.

Recipients and subrecipients must submit to FTA their own annual reports as well as an annual report from each of their contractors with covered employees. Each report submitted must cover a calendar year. The closing date for data is December 31 and the report is due at FTA by March 15 of the following year.

C. Access to Facilities and Records. (\$ 654.55)

Paragraph (a) of this section precludes an employer, in most circumstances, from releasing information contained in records required to be maintained under this rule. Examples of such records include any document generated as a result of a reasonable suspicion determination or a refusal to take an alcohol test. An employer, however, may release information when required to do so by law or this rule, or if expressly authorized.

Paragraph (b) provides that the employer must provide the employee copies of records relating to the employee's alcohol tests or pertaining to the employee's use of alcohol. Once the employee has submitted his request in writing, the employer must promptly provide the records to him. The employer may charge for reproducing the records but only for those records specifically requested.

Paragraph (c) requires the employer to allow certain governmental entities to have access to any facility used to comply with this rule. The rule provides that the Secretary of Transportation or representatives from any other DOT agency shall have access. In addition, the rule requires an employer to allow the State agency designated by the governor to oversee rail fixed guideway systems to also have access to its facilities so as to properly oversee the safety of a rail fixed guideway system as required by section 28 of the FT Act. We note here that the State oversight of rail fixed guideway system Notice of Proposed Rulemaking published in the Federal Register on December 9, 1993 at 58 FR 64856 contains FTA's proposal for the State oversight agency.

Paragraph (d) requires an employer to give certain governmental entities copies of test results and any other information pertaining to the employer's alcohol misuse prevention program. Those governmental entities are the same as those specified in subsection (c).

Paragraph (e) requires an employer to disclose information about the employer's administration of a post-accident alcohol test to the National Transportation Safety Board (NTSB) when it investigates an accident.

Paragraph (f) provides that the employer must give copies of certain records to a subsequent employer if the employee makes such a request in writing. The employer may disclose only that information specifically authorized by the employee in her written request.

Paragraph (g) requires the employer to disclose certain information when requested to do so by the employee or a decisionmaker in a lawsuit, grievance, or other proceeding when such a proceeding has been initiated by the employee and arises from the results of an alcohol test administered under this part or from the employer's determination that the employee has violated a provision in subpart B. This provision does not cover any proceeding initiated by a third party. This provision is limited to employment-type actions such as worker's compensation or unemployment compensation which are initiated by the employee.

Subsection (h) provides that the employer must release information to any individual when requested to do so by the employee in writing. The employer may release only that information specifically authorized by the employee.

Subpart E—Consequences for Employees Engaging in Alcohol-Related Conduct

In general, this subpart addresses the consequences to employees for violating any provision contained in subpart B.

This subpart contains three sections, the first two of which apply to every employee who has violated a provision in subpart B. The third section concerns only those employees whose alcohol concentration level was tested at 0.02 or greater but less than 0.04.

A. Removal From Safety-sensitive Function. (\$ 654.61)

This section requires employers to remove an employee from his safety-sensitive function if the employee has violated any of the prohibitions listed in subpart B. The regulation is silent concerning any subsequent disciplinary actions, including termination's, to be taken against the employee.

B. Required Evaluation and Testing. (\$ 654.63)

Once an employee has committed a violation of subpart B, she must not only be removed from her safety-

sensitive position, she must also be told of the resources available to her to evaluate and resolve problems associated with alcohol misuse. She must then be evaluated by a substance abuse professional.

C. Other Alcohol-related Conduct. (\$ 654.65)

This section explains the consequences for those employees whose alcohol concentration level measures at 0.02 or greater but less than 0.04. In this situation, the employer has two options: it can retest the employee and return her to her safety-sensitive function when the test indicates that her alcohol concentration level is less than 0.02. Or, the employer may remove the employee from her safety-sensitive position for at least eight hours.

An employer may not apply the consequences of Subpart E to an employee whose alcohol level measures at 0.02 or greater but less than 0.04.

Subpart F—Alcohol Misuse Information, Training, and Referral

A. Employer Obligation to Promulgate a Policy on the Misuse of Alcohol. (\$ 654.71)

The rule requires an employer to make available to every safety-sensitive employee a policy statement describing the employer's alcohol testing program. The policy must include the following information:

1. Specific categories of employees subject to testing.
2. Where to go for more information about the program.
3. When and why an employee will be tested.
4. The consequences of failing an alcohol test.

5. Program elements in addition to those required by the FTA regulation.

The FTA expects each employer to describe the consequences of a covered employee's taking an alcohol test indicating an alcohol concentration at 0.04 or greater, which must include removal of the employee from his safety-sensitive position and evaluation and possible referral for treatment. In addition, at the employer's discretion the policy statement could describe funding arrangements for treatment. The policy must indicate whether an employer would suspend or terminate a covered employee who has taken a test with a result at 0.04 or greater, and the circumstances under which such actions will be taken.

The rule does not mandate rehabilitation for a covered employee, but only requires that an employee be evaluated by an SAP to determine

whether the employee has a problem with alcohol misuse. If treatment for a covered employee is deemed necessary, the rule does not require the employer to pay for it. Any decision to provide treatment, and who should pay for it, is made at the local level.

This position on treatment is consistent with congressional debate on the topic. Both Senators Danforth and Hollings clarified this point by stating:

DOT must issue regulations . . . providing for the opportunity for treatment of employees in need of assistance in resolving problems with alcohol or drug use. My understanding is that this does not mandate that rehabilitation be provided but does encourage companies to make such programs available. The legislation does not discuss who pays for treatment, wages during this period, or rights of reinstatement. 137 Cong. Rec. S14770 (daily ed. Oct. 16, 1991) (Statement of Sen. Danforth)

The Senator's understanding is correct. Such arrangement could be left to negotiation between the employer and employee, either through individual arrangement or collective bargaining, as appropriate. . . 137 Cong. Rec. S14770 (daily ed. Oct. 16, 1991) (Statement of Sen. Hollings).

B. Training for Supervisors. (§ 654.73)

This section provides that supervisors who may make reasonable suspicion determinations must be trained about the physical, behavioral, speech, and performance indicators of probable alcohol use. Such a supervisor must receive at least 60 minutes of training, which may be added to the 60 minutes of training required under the FTA drug rule, published elsewhere in today's issue of the *Federal Register*.

C. Referral, Evaluation, and Treatment. (§ 654.75)

This section concerns only those employees who have violated a provision in Subpart B. This section requires the employer to advise such an employee of the resources available to her in resolving problems associated with alcohol misuse. The information provided by the employer should include the names, addresses, and telephone numbers of substance abuse professionals and counseling and treatment programs.

Such an employee must be evaluated by a substance abuse professional to determine whether the employee needs help in resolving problems associated with alcohol misuse. The substance abuse professional then determines what kind of help the employee needs. Any employee who has violated subpart B must take a return to duty test before she may be allowed to perform a safety-sensitive function with a result showing that her alcohol concentration level measures less than 0.02.

If, however, the SAP determines that the employee needs help in resolving problems with alcohol misuse, the employee must follow the course of treatment prescribed by the SAP. To return to duty, the employee must be evaluated by a substance abuse professional again to determine whether the employee has properly followed the treatment course originally prescribed and is able to return to work.

Then, such an employee must not only take a return to duty test but she must also submit to follow-up testing, which occurs unpredictably and unannounced for up to sixty months following her return to duty. Based on the recommendations of the SAP, the employee may be subject to both drug and alcohol follow-up testing. The employee must take at least six follow-up alcohol tests (all indicating an alcohol level less than 0.02) during the first 12 months following her return to duty. After that period of time, the SAP determines whether the employee should continue to be subject to follow-up testing for the additional 48 months and if so shall determine how many tests the employee should take and how often they should be administered.

Such an employee remains separately subject to random alcohol testing.

Paragraph (d) discusses several employment options concerning the substance abuse professional. Who pays for the services of the substance abuse professional, however, is determined at the local level.

Paragraph (e) prohibits, in some circumstances, a substance abuse professional from treating an employee after evaluation and determination that the employee needs help. This section, however, allows an evaluating SAP also to treat an employee when: (1) the SAP is an employee of or under contract to an employer; (2) the SAP is the only source of appropriate therapeutic treatment provided under the employee's health plan or reasonably accessible to the employee; (3) or the SAP works for a public agency such as a State, county, or municipality.

Paragraph (f) provides that an employer is not required to provide applicants with an opportunity for referral, evaluation, and treatment.

Subpart G—Compliance

This subpart establishes the certification requirements for recipients of FTA funding under sections 3, 9, or 18 of the FT Act or section 103(e)(4) of title 23 of the U.S. Code.

A. Compliance a Condition of FTA Financial Assistance. (§ 654.81)

This section mandates the withholding of Federal funds from a recipient of FTA funding under sections 3, 9, or 18 of the FT Act, or section 103(e)(4) of title 23 of the U.S. Code, if it is not in compliance with the rule. To be in compliance with the rule, the recipient either must implement the requirements of the rule or require their implementation by subrecipients, operators, contractors, employers, or any other entity performing a mass transit function on behalf of the recipient.

It is important to note that any misrepresentation or false statement to FTA is a criminal violation under section 1001 of title 18 of the United States Code.

B. Requirement to Certify Compliance. (§ 654.83)

This section requires a recipient to certify that the requirements of the rule have been met. We emphasize that the direct recipient of FTA funds makes this certification to FTA.

The certifications are required annually, with large operators submitting their certifications before January 1, 1995, and small operators and States submitting their certifications before January 1, 1996. States will certify on behalf of subrecipients and their contractors.

The certification itself must comply with the sample certification provided in Appendix A to this part, be authorized by the recipient's governing board or other authorizing official, and be signed by a party specifically authorized to do so.

V. Americans With Disabilities Act of 1990

Title I of the Americans With Disabilities Act of 1990 (ADA) focuses on responsibilities of employers for employees. A basic premise of title I is that a person with a disability must be provided a reasonable accommodation to work. It is possible that some covered workers will be considered persons with disabilities for purposes of protections under the ADA. For a more complete discussion of this issue please see the DOT-wide preamble preceding this FTA document in today's *Federal Register*.

VI. Economic Analysis

The FTA has evaluated the industry-wide costs and benefits of the rule, Prevention of Alcohol Misuse in Transit Operations. This rule will require personnel who perform safety-sensitive functions to be covered by a formal program to control alcohol misuse in

mass transit operations. This rule will cover FTA recipients and combine education and testing in a comprehensive alcohol misuse prevention program. Five types of alcohol tests will be administered:

- Pre-Employment
- Reasonable Suspicion
- Post-Accident
- Random
- Return to Duty/Follow-up

Transit agencies will be required to report the number of tests given, the number of test results at 0.02 or greater and other attributes of their program to the FTA and to certify compliance with this regulation annually.

Annual costs of the alcohol testing program range from \$10 to \$13 million per year. Total costs over 10 years are \$115 million.

Annual benefits range from \$6 to \$55 million per year. Total benefits over 10 years are \$482 million.

A major premise in calculating both costs and benefits is the assumption that all transit systems will start from scratch or "ground zero" when implementing alcohol testing programs as a result of this regulation.

Estimates in this analysis are based on (1) the 1989 and 1991 National Urban Mass Transportation Statistics Section 15 Annual Reports, (2) the 1991 report, Substance Abuse in the Transit Industry, prepared for the FTA by Booz, Allen & Hamilton, Inc., (3) data provided by the Substance Abuse and Mental Health Service Administration, and (4) information from other agencies, individuals, and organizations knowledgeable about alcohol misuse in the United States.

VII. Regulatory Process Matters

A. Executive Order 12688

The FTA has evaluated the industry costs and benefits of the drug testing rule, and has determined that this rulemaking is a significant rule under Executive Order 12688 because the required alcohol misuse prevention program raises novel policy issues and will materially affect public safety as well as State and local governments. This rule will not, however, have an annual impact on the economy of \$100 million or more.

B. Departmental Significance

This rule is a "significant regulation" as defined by the Department's Regulatory Policies and Procedures, because it involves an important departmental policy and will probably generate a great deal of public interest. The purpose of this rule is to make mass transit systems safer by ensuring that

safety-sensitive employees do not misuse alcohol.

C. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., the FTA has evaluated the effects of this rule on small entities. Based on the evaluation, the FTA hereby certifies that this action will have a significant economic impact on a substantial number of small entities. The rule has some provisions designed to mitigate burdens on small entities which are discussed in the regulatory evaluation.

This rule applies to public recipients of Federal Transit funds, 274 of which are large and 1,341 of which are small. It is estimated that it will cost the small transit systems \$40 million to implement this alcohol rule, with total benefits to them of \$147 million over the 10-year analysis.

D. Paperwork Reduction Act

This rule includes information collection requirements subject to the Paperwork Reduction Act. A request for Paperwork Reduction Act approval has been submitted to the Office of Management and Budget in conjunction with this rule. Information collection requirements are not effective until Paperwork Reduction Act clearance has been received.

E. Executive Order 12612

We have reviewed this rule under the requirements of Executive Order 12612 on Federalism. Although the Federal Transit Administration has determined that this rule has significant Federalism implications to warrant a Federalism assessment, this rulemaking is mandated by the Omnibus Transportation Employee Testing Act of 1991 (the Act). In considering the Federalism implications of the rule, FTA has focused on several key provisions of Executive Order 12612.

Necessity for action. This rule is mandated by law, which requires comprehensive drug and alcohol testing programs of recipients of Federal transit funding. Congress responded to specific accidents by mandating these rules to ensure the safety of the transit-riding public.

Consultation with State and local governments. FTA provides financial assistance to mass transportation systems throughout the country by means of grants to States and public bodies. Because this rule will affect those States and local entities, we published a Notice of Proposed Rulemaking (NPRM) in the Federal Register to solicit the views of the affected entities, including States and

local governments, and held three public hearings in conjunction with the NPRM. In short, we actively sought the views and comments of the affected States and localities.

Need for Federal action. This rule responds to a Congressional mandate that the safety of the transit riding public requires comprehensive anti-drug and alcohol testing programs.

Authority. The statutory authority for this final rule is the Act mentioned above and discussed elsewhere in the preamble.

Preemption. This rule preempts any State or local law, order, or regulation to the contrary, and also is discussed elsewhere in the preamble. Because compliance with the rule is a condition of Federal financial assistance, State and local governments have the option of not seeking the Federal funds if they do not choose to comply with this rule.

F. National Environmental Policy Act

The agency has determined that this regulation has no environmental implications. Its purpose is to regulate the behavior of those safety-sensitive employees who work in the transit industry and will have no appreciable effect on the quality of the environment.

G. Energy Impact Implications

This regulation does not affect the use of energy because it regulates the behavior of those safety-sensitive employees who work in the transit industry.

List of Subjects in 49 CFR Part 654

Alcohol testing, Grant programs—transportation, Mass transit, Reporting and recordkeeping requirements, Safety, Transportation.

Accordingly, for the reasons cited above, the agency amends title 49 by adding a new part 654, to read as set forth below:

PART 654—Prevention of Alcohol Misuse in Transit Operations

Sec.

Subpart A—General

- 654.1 Purpose.
- 654.3 Applicability.
- 654.5 Alcohol testing procedures.
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- 654.9 Preemption of State and local laws.
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Subpart B—Prohibitions

- 654.21 Alcohol concentration.
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- 654.25 Pre-duty use.

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Subpart C—Tests Required

- 654.31 Pre-employment testing.
 654.33 Post-accident testing.
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 654.37 Reasonable suspicion testing.
 654.39 Return to duty testing.
 654.41 Follow-up testing.
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Subpart D—Administrative Requirements

- 654.51 Retention of records.
 654.53 Reporting of results in a management information system.
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Subpart E—Consequences For Employees Engaging in Alcohol-related Conduct

- 654.61 Removal from safety-sensitive function.
 654.63 Required evaluation and testing.
 654.65 Other alcohol-related conduct.

Subpart F—Alcohol Misuse Information, Training, and Referral

- 654.71 Employer obligation to promulgate a policy on the misuse of alcohol.
 654.73 Training for supervisors.
 654.75 Referral, evaluation, and treatment.

Subpart G—Compliance

- 654.81 Compliance a condition of FTA financial assistance.
 654.83 Requirement to certify compliance.

Appendix A to Part 654—Sample Certifications of Compliance

Appendix B to Part 654—FTA Alcohol Testing Management Information System (MIS) Data Collection Form.

Appendix C to Part 654—FTA Alcohol Testing Management Information System (MIS) "EZ" Data Collection Form.

Authority: Sec. 6, Pub. L. 102-143; 49 CFR 1.51.

Subpart A—General

654.1 Purpose.

The purpose of this part is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol by employees who perform safety-sensitive functions for employers receiving assistance from the Federal Transit Administration (FTA).

654.3 Applicability.

(a) Except as specifically excluded in paragraph (b) of this section, this part applies to a recipient under—

- (1) Section 3, 9, or 18 of the Federal Transit Act, as amended (FT Act); or
- (2) Section 103(e)(4) of title 23 of the United States Code.

(b) A recipient operating a railroad regulated by the Federal Railroad Administration (FRA) shall follow 49 CFR part 219 and § 654.83 of this part

for its railroad operations, and this part for its non-railroad operations, if any.

(Note: For recipients who operate marine vessels, see also United States Coast Guard regulations at 33 CFR part 95 and 46 CFR parts 4, 5, and 6.)

§ 654.5 Alcohol testing procedures.

Each employer shall ensure that all alcohol testing conducted under this part complies with the procedures set forth in part 40 of this title. The provisions of part 40 that address alcohol testing are made applicable to employers by this part.

§ 654.7 Definitions.

As used in this part—

Accident means an occurrence associated with the operation of a vehicle, if as a result—

- (1) An individual dies;
- (2) An individual suffers a bodily injury and immediately receives medical treatment away from the scene of the accident;
- (3) With respect to an occurrence in which the mass transit vehicle involved is a bus, electric bus, van, or automobile, one or more vehicles incurs disabling damage as the result of the occurrence and is transported away from the scene by a tow truck or other vehicle. For purposes of this definition, "disabling damage" means damage which precludes departure of any vehicle from the scene of the occurrence in its usual manner in daylight after simple repairs. Disabling damage includes damage to vehicles that could have been operated but would have been further damaged if so operated, but does not include damage which can be remedied temporarily at the scene of the occurrence without special tools or parts, tire disablement without other damage even if no spare tire is available, or damage to headlights, taillights, turn signals, horn, or windshield wipers that makes them inoperative; or
- (4) With respect to an occurrence in which the mass transit vehicle involved is a rail car, trolley car, trolley bus, or vessel, the mass transit vehicle is removed from revenue service.

Administrator means the Administrator of the Federal Transit Administration or the Administrator's designee.

Alcohol means the intoxicating agent in beverage alcohol, ethyl alcohol or other low molecular weight alcohols, including methyl or isopropyl alcohol.

Alcohol concentration means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by an evidential breath test under this part.

Alcohol use means the consumption of any beverage, mixture, or preparation, including any medication, containing alcohol.

Certification means a recipient's written statement, authorized by the organization's governing board or other authorizing official, that the recipient has complied with the provisions of this part. (See § 654.87 for requirements on certification.)

Confirmation test means a second test, following a screening test with a result of 0.02 or greater, that provides quantitative data of alcohol concentration.

Consortium means an entity, including a group or association of employers, operators, recipients, subrecipients, or contractors, which provides alcohol testing as required by this part, or other DOT alcohol testing rule, and which acts on behalf of the employer.

Contractor means a person or organization that provides a service for a recipient, subrecipient, employer, or operator consistent with a specific understanding or arrangement. The understanding can be a written contract or an informal arrangement that reflects an ongoing relationship between the parties.

Covered employee means a person, including a volunteer, applicant, or transferee, who performs a safety-sensitive function for an entity subject to this part.

DOT means the United States Department of Transportation.

DOT agency means an agency (or "operating administration") of the United States Department of Transportation administering regulations requiring alcohol testing (14 CFR part 61, 63, 65, 121, and 135; 49 CFR parts 199, 219, 382, and 654) in accordance with part 40 of this title.

Employer means a recipient or other entity that provides mass transportation service or which performs a safety-sensitive function for such recipient or other entity. This term includes subrecipients, operators, and contractors.

FTA means the Federal Transit Administration, an agency of the U.S. Department of Transportation.

Large operator means a recipient or subrecipient primarily operating in an area of 200,000 or more in population.

Performing (a safety-sensitive function) means a covered employee is considered to be performing a safety-sensitive function and includes any period in which he or she is actually performing, ready to perform, or immediately available to perform such functions.

Railroad means all forms of non-highway ground transportation that run on rails or electromagnetic guideways, including (1) commuter or other short-haul rail passenger service in a metropolitan or suburban area, as well as any commuter rail service which was operated by the Consolidated Rail Corporation as of January 1, 1979, and (2) high speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads. Such term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation.

Recipient means an entity receiving Federal financial assistance under section 3, 9, or 18, of the FT Act, or under section 103(e)(4) of title 23 of the United States Code.

Refuse to submit (to an alcohol test) means that a covered employee fails to provide adequate breath for testing without a valid medical explanation after he or she has received notice of the requirement to be tested in accordance with the provisions of this part, or engages in conduct that clearly obstructs the testing process.

Safety-sensitive function means any of the following duties:

- (1) Operating a revenue service vehicle, including when not in revenue service;
- (2) Operating a nonrevenue service vehicle, when required to be operated by a holder of a Commercial Driver's License;
- (3) Controlling dispatch or movement of a revenue service vehicle;
- (4) Maintaining a revenue service vehicle or equipment used in revenue service, unless the recipient receives section 18 funding and contracts out such services; or
- (5) Carrying a firearm for security purposes.

Screening test means an analytical procedure to determine whether a covered employee may have a prohibited concentration of alcohol in his or her system.

Small operator means a recipient or subrecipient primarily operating in an area of less than 200,000 in population.

Substance abuse professional (SAP) means a licensed physician (Medical Doctor or Doctor of Osteopathy), or a licensed or certified psychologist, social worker, employee assistance professional, or addiction counselor (certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission), with knowledge of and clinical experience in

the diagnosis and treatment of drug and alcohol-related disorders.

Vehicle means a bus, electric bus, van, automobile, rail car, trolley car, trolley bus, or vessel. A "mass transit vehicle" is a vehicle used for mass transportation.

Violation rate means the number of covered employees (as reported under § 654.53 of this part) found during random tests given under this part to have an alcohol concentration of .04 or greater, plus the number of employees who refuse a random test required by this part, divided by the total reported number of employees in the industry given random alcohol tests under this part plus the total reported number of employees in the industry who refuse a random test required by this part.

§ 654.9 Preemption of State and local laws.

(a) Except as provided in paragraph (b) of this section, this part preempts any State or local law, rule, regulation, or order, to the extent that:

- (1) Compliance with both the State or local requirement and any requirement in this part is not possible; or
- (2) Compliance with the State or local requirement is an obstacle to the accomplishment and execution of any requirement in this part.

(b) This part shall not be construed to preempt provisions of State criminal law that impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees or employers or to the general public.

§ 654.11 Other requirements imposed by employers.

Except as expressly provided in this part, nothing in this part shall be construed to affect the authority of employers, or the rights of employees, with respect to the use or possession of alcohol, including authority and rights with respect to alcohol testing and rehabilitation.

§ 654.13 Requirement for notice.

Before performing an alcohol test under this part, each employer shall notify a covered employee that the alcohol test is required by this part. No employer shall falsely represent that a test is administered under this part.

§ 654.15 Starting date for alcohol testing programs.

(a) **Large employers.** Each recipient operating in an area of 200,000 or more in population on March 17, 1994 shall implement the requirements of this part beginning on January 1, 1995.

(b) **Small employers.** Each recipient operating in an area of 200,000 or less

in population on March 17, 1994 shall implement the requirements of this part beginning on January 1, 1996.

(c) An employer shall have an alcohol misuse program that conforms to this part by January 1, 1996, or by the date the employer begins operations, whichever is later.

Subpart B—Prohibitions

§ 654.21 Alcohol concentration.

Each employer shall prohibit a covered employee from reporting for duty or remaining on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of 0.04 or greater. No employer having actual knowledge that a covered employee has an alcohol concentration of 0.04 or greater shall permit the employee to perform or continue to perform safety-sensitive functions.

§ 654.23 On-duty use.

Each employer shall prohibit a covered employee from using alcohol while performing safety-sensitive functions. No employer having actual knowledge that a covered employee is using alcohol while performing safety-sensitive functions shall permit the employee to perform or continue to perform safety-sensitive functions.

§ 654.25 Pre-duty use.

(a) **General.** Each employer shall prohibit a covered employee from using alcohol within 4 hours prior to performing safety-sensitive functions. No employer having actual knowledge that a covered employee has used alcohol within four hours of performing a safety-sensitive function shall permit the employee to perform or continue to perform safety-sensitive functions.

(b) **On-call employees.** An employer shall prohibit the consumption of alcohol for the specified on-call hours of each covered employee who is on-call. The procedure shall include:

(1) The opportunity for the covered employee to acknowledge the use of alcohol at the time he or she is called to report to duty and the inability to perform his or her safety-sensitive function.

(2) The requirement that the covered employee take an alcohol test, if the covered employee has acknowledged the use of alcohol, but claims ability to perform his or her safety-sensitive function.

§ 654.27 Use following an accident.

Each employer shall prohibit any covered employee required to take a post-accident alcohol test under § 654.33 from alcohol use for eight

hours following the accident or until he or she undergoes a post-accident alcohol test, whichever occurs first.

§ 654.29 Refusal to submit to a required alcohol test.

Each employer shall require a covered employee to submit to a post-accident alcohol test required under § 654.33, a random alcohol test required under § 654.35, a reasonable suspicion alcohol test required under § 654.37, or a follow-up alcohol test required under § 654.41. No employer shall permit an employee who refuses to submit to such a test to perform or continue to perform safety-sensitive functions.

Subpart C—Tests Required

§ 654.31 Pre-employment testing.

(a) Prior to the first time a covered employee performs safety-sensitive functions for an employer, the employer shall ensure that the employee undergoes testing for alcohol. No employer shall allow a covered employee to perform safety-sensitive functions, unless the employee has been administered an alcohol test with a result indicating an alcohol concentration less than 0.04. If a pre-employment test result under this section indicates an alcohol concentration of 0.02 or greater but less than 0.04, the provisions of § 654.65 shall apply.

(b) An employer may elect not to administer an alcohol test required by paragraph (a) of this section, if:

(1) The employee has undergone an alcohol test required by this Part or the alcohol misuse rule of another DOT agency under part 40 of this title within the previous six months, with a result indicating an alcohol concentration less than 0.04; and

(2) The employer ensures that no prior employer of the covered employee of whom the employer has knowledge has records of a violation of this subpart or the alcohol misuse rule of another DOT agency within the previous six months.

§ 654.33 Post-accident testing.

(a)(1) *Fatal accidents.* As soon as practicable following an accident involving the loss of human life, an employer shall test each surviving covered employee on duty in the mass transit vehicle at the time of the accident. The employer shall also test any other covered employee whose performance could have contributed to the accident, as determined by the employer using the best information available at the time of the decision.

(2) *Nonfatal accidents.* (i) As soon as practicable following an accident not

involving the loss of human life, in which the mass transit vehicle involved is a bus, electric bus, van, or automobile, the employer shall test each covered employee on duty in the mass transit vehicle at the time of the accident if that employee has received a citation under State or local law for a moving traffic violation arising from the accident. The employer shall also test any other covered employee whose performance could have contributed to the accident, as determined by the employer using the best information available at the time of the decision.

(ii) As soon as practicable following an accident not involving the loss of human life, in which the mass transit vehicle involved is a rail car, trolley car, trolley bus, or vessel, the employer shall test each covered employee on duty in the mass transit vehicle at the time of the accident unless the employer determines, using the best information available at the time of the decision, that the covered employee's performance can be completely discounted as a contributing factor to the accident. The decision not to administer a test under this paragraph shall be based on the employer's determination, using the best available information at the time of the determination, that the employee's performance could not have contributed to the accident. The employer shall also test any other covered employee whose performance could have contributed to the accident, as determined by the employer using the best information available at the time of the decision.

(b) If a test required by this section is not administered within two hours following the accident, the employer shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by this paragraph is not administered within eight hours following the accident, the employer shall cease attempts to administer an alcohol test and shall maintain the same record. Records shall be submitted to the FTA upon request of the Administrator.

(c) A covered employee who is subject to post-accident testing who fails to remain readily available for such testing, including notifying the employer or employer representative of his or her location if he or she leaves the scene of the accident prior to submission to such test, may be deemed by the employer to have refused to submit to testing. Nothing in this section shall be construed to require the delay of necessary medical attention for injured people following an accident or to prohibit a covered employee from leaving the scene of an accident for the

period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care.

§ 654.35 Random testing.

(a) Except as provided in paragraphs (b) through (d) of this section, the minimum annual percentage rate for random alcohol testing shall be 25 percent of covered employees.

(b) The Administrator's decision to increase or decrease the minimum annual percentage rate for random alcohol testing is based on the reported violation rate for the entire industry. All information used for this determination is drawn from the alcohol MIS reports required by § 654.53. In order to ensure reliability of the data, the Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry violation rate. Each year, the Administrator will publish in the *Federal Register* the minimum annual percentage rate for random alcohol testing of covered employees. The new minimum annual percentage rate for random alcohol testing will be applicable starting January 1 of the calendar year following publication.

(c)(1) When the minimum annual percentage rate for random alcohol testing is 25 percent or more, the Administrator may lower this rate to 10 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 654.53 for two consecutive calendar years indicate that the violation rate is less than 0.5 percent.

(2) When the minimum annual percentage rate for random alcohol testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 654.53 for two consecutive calendar years indicate that the violation rate is less than 1.0 percent but equal to or greater than 0.5 percent.

(d)(1) When the minimum annual percentage rate for random alcohol testing is 10 percent, and the data received under the reporting requirements of § 654.53 for that calendar year indicate that the violation rate is equal to or greater than 0.5 percent, but less than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 25 percent of all covered employees.

(2) When the minimum annual percentage rate for random alcohol

testing is 25 percent or less, and the data received under the reporting requirements of § 654.53 for that calendar year indicate that the violation rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 50 percent of all covered employees.

(e) The selection of employees for random alcohol testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with employees' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the selection process used, each covered employee shall have an equal chance of being tested each time selections are made.

(f) The employer shall randomly select a sufficient number of covered employees for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random alcohol testing determined by the Administrator. If the employer conducts random alcohol testing through a consortium, the number of employees to be tested may be calculated for each individual employer or may be based on the total number of covered employees covered by the consortium who are subject to random alcohol testing at the same minimum annual percentage rate under this part or any DOT alcohol testing rule.

(g) Each employer shall ensure that random alcohol tests conducted under this part are unannounced and that the dates for administering random tests are spread reasonably throughout the calendar year.

(h) Each employer shall require that each covered employee who is notified of selection for random alcohol testing proceeds to the test site immediately; provided, however, that if the employee is performing a safety-sensitive function at the time of the notification, the employer shall instead ensure that the employee ceases to perform the safety-sensitive function and proceeds to the testing site as soon as possible.

(i) A covered employee shall only be randomly tested while the employee is performing safety-sensitive functions; just before the employee is to perform safety-sensitive functions; or just after the employee has ceased performing such functions.

§ 654.37 Reasonable suspicion testing.

(a) An employer shall require a covered employee to submit to an alcohol test when the employer has

reasonable suspicion to believe that the employee has violated the prohibitions in this part.

(b) The employer's determination that reasonable suspicion exists to require the covered employee to undergo an alcohol test shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the employee. The required observations shall be made by a supervisor who is trained in detecting the symptoms of alcohol misuse. The supervisor who makes the determination that reasonable suspicion exists shall not conduct the breath alcohol test on that employee.

(c) Alcohol testing is authorized by this section only if the observations required by paragraph (b) of this section are made during, just preceding, or just after the period of the work day that the covered employee is required to be in compliance with this part. An employer may direct a covered employee to undergo reasonable suspicion testing for alcohol only while the employee is performing safety-sensitive functions; just before the employee is to perform safety-sensitive functions; or just after the employee has ceased performing such functions.

(d)(1) If a test required by this section is not administered within two hours following the determination under paragraph (b) of this section, the employer shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by this section is not administered within eight hours following the determination under paragraph (b) of this section, the employer shall cease attempts to administer an alcohol test and shall state in the record the reasons for not administering the test.

(2) Notwithstanding the absence of a reasonable suspicion alcohol test under this section, an employer shall not permit a covered employee to report for duty or remain on duty requiring the performance of safety-sensitive functions while the employee is under the influence of or impaired by alcohol, as shown by the behavioral, speech, or performance indicators of alcohol misuse, nor shall an employer permit the covered employee to perform or continue to perform safety-sensitive functions, until:

(i) An alcohol test is administered and the employee's alcohol concentration measures less than 0.02 percent; or

(ii) The start of the employee's next regularly scheduled duty period, but not less than 8 hours following the determination under paragraph (b) of this section that there is reasonable

suspicion to believe that the employee has violated the prohibitions in this part.

(3) Except as provided in paragraph (d)(2), no employer shall take any action under this part against a covered employee based solely on the employee's behavior and appearance in the absence of an alcohol test. This does not prohibit an employer with the authority independent of this part from taking any action otherwise consistent with law.

§ 654.39 Return to duty testing.

Each employer shall ensure that before a covered employee returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by subpart B of this part, the employee shall undergo a return to duty alcohol test with a result indicating an alcohol concentration of less than 0.02. (See § 654.75)

§ 654.41 Follow-up testing.

(a) Follow-up testing shall be conducted when the employee is performing safety-sensitive functions; just before the employee is to perform safety-sensitive functions; or just after the employee has ceased performing such functions.

(b) Following a determination under § 654.75(b) that a covered employee is in need of assistance in resolving problems associated with alcohol misuse, each employer shall ensure that the employee is subject to unannounced follow-up testing as directed by a substance abuse professional in accordance with the provisions of § 654.75(c)(2)(ii).

§ 654.43 Retesting of covered employees with an alcohol concentration of 0.02 or greater but less than 0.04.

Each employer shall retest a covered employee to ensure compliance with the provisions of § 654.65, if the employer chooses to permit the employee to perform a safety-sensitive function within 8 hours following the administration of an alcohol test indicating an alcohol concentration of 0.02 or greater but less than 0.04.

Subpart D—Administrative Requirements

§ 654.51 Retention of records.

(a) *General requirement.* Each employer shall maintain records of its alcohol misuse prevention program as provided in this section. The records shall be maintained in a secure location with controlled access.

(b) *Period of retention.* Each employer shall maintain the records in accordance with the following schedule:

(1) *Five years.* Records of employee alcohol test results with results indicating an alcohol concentration of 0.02 or greater, documentation of refusals to take required alcohol tests, calibration documentation, and employee evaluation and referrals shall be maintained for a minimum of five years. Each employer shall maintain a copy of its annual MIS report(s) for a minimum of five years.

(2) *Two years.* Records related to the collection process (except calibration of EBT's) and training shall be maintained for a minimum of two years.

(3) *One year.* Records of all test results less than 0.02 shall be maintained for a minimum of one year.

(c) *Types of records.* The following specific records shall be maintained.

(1) Records related to the collection process:

(i) Collection logbooks, if used.

(ii) Documents relating to the random selection process.

(iii) Calibration documentation for evidential breath testing devices.

(iv) Documentation of breath alcohol technician training.

(v) Documents generated in connection with decisions to administer reasonable suspicion alcohol tests.

(vi) Documents generated in connection with decisions on post-accident tests.

(vii) Documents verifying existence of a medical explanation of the inability of a covered employee to provide adequate breath for testing.

(2) Records related to test results:

(i) The employer's copy of the alcohol test form, including the results of the test.

(ii) Documents related to the refusal of any covered employee to submit to an alcohol test required by this part.

(iii) Documents presented by a covered employee to dispute the result of an alcohol test administered under this part.

(3) Records related to other violations of this part.

(4) Records related to evaluations:

(i) Records pertaining to a determination by a substance abuse professional concerning a covered employee's need for assistance.

(ii) Records concerning a covered employee's compliance with the recommendations of the substance abuse professional.

(5) Copies of annual MIS reports submitted to FTA.

(6) Records related to education and training:

(i) Materials on alcohol misuse awareness, including a copy of the employer's policy on alcohol misuse.

(ii) Documentation of compliance with the requirements of § 654.71 of this part.

(iii) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for alcohol testing based on reasonable suspicion.

(iv) Certification that any training conducted under this part complies with the requirements for such training.

§ 654.53 Reporting of results in a management information system.

(a) Each recipient shall submit to the FTA Office of Safety and Security by March 15 of each year a report covering the previous calendar year (January through December 31), summarizing the results of its alcohol misuse prevention program.

(b) Each recipient shall ensure the accuracy and timeliness of each report submitted by an employer, consortium, joint enterprise, or by a third party service provider acting on the employer's behalf.

(c) Each report that contains information on an alcohol screening test result of 0.02 or greater or a violation of the alcohol misuse provisions of this part shall include the following informational elements:

(1) Number of FTA covered employees by employee category.

(2)(i) Number of screening tests by type of test and employee category.

(ii) Number of confirmation tests, by type of test and employee category.

(3) Number of confirmation alcohol tests indicating an alcohol concentration of 0.02 or greater but less than 0.04, by type of test and employee category.

(4) Number of confirmation alcohol tests indicating an alcohol concentration of 0.04 or greater, by type of test and employee category.

(5) Number of persons denied a position as a covered employee following a pre-employment alcohol test indicating an alcohol concentration of 0.04 or greater.

(6) Number of covered employees with a confirmation alcohol test indicating an alcohol concentration of 0.04 or greater who were returned to duty in covered positions during the reporting period (having complied with the recommendation of a substance abuse professional as described in § 654.75).

(7) Number of fatal and nonfatal accidents which resulted in a post-accident alcohol test indicating an alcohol concentration of 0.04 or greater.

(8) Number of fatalities resulting from accidents which resulted in a post-accident alcohol test indicating an alcohol concentration of 0.04 or greater.

(9) Number of covered employees who were found to have violated other provisions of subpart B of this part and the action taken in response to the violation.

(10) Number of covered employees who were administered alcohol and drug tests at the same time, with a positive drug test result and an alcohol test result indicating an alcohol concentration of 0.04 or greater.

(11) Number of covered employees who refused to submit to a random alcohol test required under this part.

(12) Number of covered employees who refused to submit to a non-random alcohol test required under this part.

(13) Number of supervisors who have received training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.

(14) Identification of FTA funding source(s).

(d) Each report with no screening test results of 0.02 or greater or violations of the alcohol misuse provisions of this part shall include the following informational elements. (This report may only be submitted if the program results meet these criteria.)

(1) Number of FTA covered employees.

(2) Number of alcohol tests conducted with results less than 0.02 by type of test and employee category.

(3) Number of employees with a confirmation alcohol test indicating an alcohol concentration of 0.04 or greater who were returned to duty in a covered position during the reporting period.

(4) Number of covered employees who refused to submit to a random alcohol test required under this part.

(5) Number of covered employees who refused to submit to a non-random alcohol test required under this part.

(6) Number of supervisors who have received training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.

(7) Identification of FTA funding source(s).

§ 654.55 Access to facilities and records.

(a) Except as required by law or expressly authorized or required in this section, no employer shall release covered employee information that is contained in records required to be maintained under § 654.51.

(b) A covered employee is entitled, upon written request, to obtain copies of any records pertaining to the employee's use of alcohol, including any records pertaining to his or her alcohol tests. The employer shall promptly provide the records requested by the employee. Access to an employee's records shall not be contingent upon payment for

records other than those specifically requested.

(c) Each employer shall permit access to all facilities utilized in complying with the requirements of this part to the Secretary of Transportation, any DOT agency with regulatory authority over the employer or any of its covered employees or to a State oversight agency authorized to oversee rail fixed guideway systems.

(d) Each employer shall make available copies of all results for employer alcohol testing conducted under this part and any other information pertaining to the employer's alcohol misuse prevention program, when requested by the Secretary of Transportation, or any DOT agency with regulatory authority over the employer or covered employee, or to a State oversight agency authorized to oversee rail fixed guideway systems.

(e) When requested by the National Transportation Safety Board as part of an accident investigation, employers shall disclose information related to the employer's administration of a post-accident alcohol test administered following the accident under investigation.

(f) Records shall be made available to a subsequent employer upon receipt of written request from the covered employee. Disclosure by the subsequent employer is permitted only as expressly authorized by the terms of the employee's request.

(g) An employer may disclose information required to be maintained under this part pertaining to a covered employee to the employee or the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual, and arising from the results of an alcohol test administered under this part, or from the employer's determination that the employee engaged in conduct prohibited by subpart B of this part (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the employee).

(h) An employer shall release information regarding a covered employee's records as directed by the specific, written consent of the employee authorizing release of the information to an identified person. Release of such information by the person receiving the information is permitted only in accordance with the terms of the employee's consent.

Subpart E—Consequences for Employees Engaging in Alcohol-related Conduct

§ 654.61 Removal from safety-sensitive function.

Except as provided in subpart F of this part, no employer shall permit any covered employee to perform safety-sensitive functions if the employee has engaged in conduct prohibited by subpart B of this part or an alcohol misuse rule of another DOT agency.

§ 654.63 Required evaluation and testing.

No employer shall permit any covered employee who has engaged in conduct prohibited by subpart B of this part to perform safety-sensitive functions unless the employee has met the requirements of § 654.75.

§ 654.65 Other alcohol-related conduct.

(a) No employer shall permit a covered employee tested under the provisions of subpart C of this part who is found to have an alcohol concentration of 0.02 or greater but less than 0.04 to perform or continue to perform safety-sensitive functions, until:

(1) The employee's alcohol concentration measures less than 0.02; or

(2) The start of the employee's next regularly scheduled duty period, but not less than eight hours following administration of the test.

(b) Except as provided in paragraph (a) of this section, no employer shall take any action under this part against an employee based solely on test results showing an alcohol concentration less than 0.04. This does not prohibit an employer with authority independent of this part from taking any action otherwise consistent with law.

Subpart F—Alcohol Misuse Information, Training, and Referral

§ 654.71 Employer obligation to promulgate a policy on the misuse of alcohol.

(a) *General requirements.* Each employer shall provide educational materials that explain the requirements of this part and the employer's policies and procedures with respect to meeting those requirements. The policy shall be adopted by the employer's governing board.

(1) The employer shall ensure that a copy of these materials is distributed to each covered employee prior to the start of alcohol testing under this section of the employer's alcohol misuse prevention program and to each person subsequently hired or transferred to a covered position.

(2) Each employer shall provide written notice to every covered employee and to representatives of employee organizations of the availability of this information.

(b) *Required content.* The materials to be made available to covered employees shall include detailed discussion of at least the following:

(1) The identity of the person designated by the employer to answer employee questions about the materials.

(2) The categories of employees who are subject to the provisions of this part.

(3) Sufficient information about the safety-sensitive functions performed by those employees to make clear what period of the work day the covered employee is required to be in compliance with this part.

(4) Specific information concerning employee conduct that is prohibited by this part.

(5) The circumstances under which a covered employee will be tested for alcohol under this part.

(6) The procedures that will be used to test for the presence of alcohol, protect the employee and the integrity of the breath testing process, safeguard the validity of the test results, and ensure that those results are attributed to the correct employee.

(7) The requirement that a covered employee submit to alcohol tests administered in accordance with this part.

(8) An explanation of what constitutes a refusal to submit to an alcohol test and the attendant consequences.

(9) The consequences for covered employees found to have violated the prohibitions imposed under subpart B, including the requirement that the employee be removed immediately from safety-sensitive functions, and the procedures under § 654.75 of this part.

(10) The consequences for covered employees found to have an alcohol concentration of 0.02 or greater but less than 0.04.

(11) Information concerning the effects of alcohol misuse on an individual's health, work, and personal life; signs and symptoms of an alcohol problem (the employee's or a coworker's); and available methods of intervening when an alcohol problem is suspected, including confrontation, referral to any available EAP, and/or referral to management.

(c) *Optional provisions.* The materials supplied to covered employees may also include information on additional employer policies with respect to the use or possession of alcohol, including any consequences for an employee found to have a specified alcohol concentration, that are based on the

employer's authority independent of this part. Any such additional policies or consequences shall be clearly and obviously described as being based on independent authority.

§ 654.73 Training for supervisors.

Every employer shall ensure that supervisors designated to determine whether reasonable suspicion exists to require a covered employee to undergo alcohol testing under § 654.37 receive at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse.

§ 654.75 Referral, evaluation, and treatment.

(a) Each covered employee who has engaged in conduct prohibited by subpart B of this part shall be advised by the employer of the resources available to the employee in evaluating and resolving problems associated with the misuse of alcohol, including the names, addresses, and telephone numbers of substance abuse professionals and counseling and treatment programs.

(b) Each covered employee who engages in conduct prohibited under subpart B shall be evaluated by a substance abuse professional who shall determine what assistance, if any, the employee needs in resolving problems associated with alcohol misuse.

(c)(1) Before a covered employee returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by subpart B of this part, the employee shall undergo a return to duty alcohol test with a result indicating an alcohol concentration of less than 0.02. In addition, the substance abuse professional may recommend that the employee be subject to a return to duty drug test, performed in accordance with 49 CFR part 40.

(2) In addition, each covered employee identified as needing assistance in resolving problems associated with alcohol misuse:

(i) Shall be evaluated by a substance abuse professional to determine that the employee has properly followed any rehabilitation program prescribed under paragraph (b) of this section, and

(ii) Shall be subject to unannounced follow-up alcohol testing administered by the employer following the employee's return to duty. The number and frequency of such follow-up testing shall be as directed by the substance abuse professional, and consist of at least six tests in the first 12 months following the employee's return to duty. In addition, follow up testing may

include testing for drugs, as directed by the substance abuse professional, to be performed in accordance with 49 CFR part 40. Follow-up testing shall not exceed 60 months from the date of the employee's return to duty. The substance abuse professional may terminate the requirement for follow-up testing at any time after the first six tests have been administered, if the substance abuse professional determines that such testing is no longer necessary.

(d) Evaluation and rehabilitation may be provided by the employer, by a substance abuse professional under contract with the employer, or by a substance abuse professional not affiliated with the employer. The choice of substance abuse professional and assignment of costs shall be made in accordance with employer/employee agreements and employer policies.

(e) The employer shall ensure that a substance abuse professional who determines that a covered employee requires assistance in resolving problems with alcohol misuse does not refer the employee to the substance abuse professional's private practice from which the substance abuse professional receives remuneration or to a person or organization in which the substance abuse professional has a financial interest. This paragraph does not prohibit a substance abuse professional from referring an employee for assistance provided through—

(1) A public agency, such as a State, county, or municipality;

(2) The employer or a person under contract to provide treatment for alcohol problems on behalf of the employer;

(3) The sole source of therapeutically appropriate treatment under the employee's health insurance program; or

(4) The sole source of therapeutically appropriate treatment reasonably accessible to the employee.

(f) The requirements of this section with respect to referral, evaluation, and rehabilitation, do not apply to applicants who refuse to submit to a pre-employment alcohol test or who have a pre-employment alcohol test with a result indicating an alcohol concentration of 0.04 or greater.

Subpart G—Compliance

§ 654.81 Compliance a condition of FTA financial assistance.

(a) *General.* A recipient may not be eligible for Federal financial assistance under section 3, 9, or 18 of the Federal Transit Act, as amended, or under section 103(e)(4) of title 23 of the United States Code if a recipient fails to establish and implement an alcohol

misuse prevention program as required by this part. Failure to certify compliance with these requirements, as specified in § 654.83, will result in the suspension of a grantee's eligibility for Federal funding.

(b) *Criminal violation.* A recipient is subject to criminal sanctions and fines for false statements or misrepresentations under § 1001 of title 18 of the United States Code.

(c) *State's role.* Each State shall certify compliance on behalf of its section 3, 9 or 18 subrecipients, as applicable, whose grant the State administers. In so certifying, the State shall ensure that each subrecipient is complying with the requirements of this part. A section 3, 9 or 18 subrecipient, through the administering State, is subject to suspension of funding from the State if such subrecipient is not in compliance with this part.

§ 654.83 Requirement to certify compliance.

(a) A recipient of FTA financial assistance shall certify annually to the applicable FTA Regional Office compliance with the requirements of this part, including the training requirements. Large operators shall certify compliance initially by January 1, 1995. Small operators and States shall certify compliance initially by January 1, 1996.

(b) A certification must be authorized by the organization's governing board or other authorizing official, and must be signed by a party specifically authorized to do so. A certification must comply with the applicable sample certification provided in Appendix A to this part.

Appendix A to Part 654—Sample Certifications of Compliance

This Appendix contains two separate examples of certification language. The first example consists of the generally applicable certification language. Example II should be used by employers who are covered by Federal Railroad Administration's alcohol misuse prevention program regulations.

I

(a) *For recipients who are large or small operators*

I, (name), (title), certify that (name of recipient) and its contractors, as required, for (name of recipient), has established and implemented an alcohol misuse prevention program in accordance with the terms of 49 CFR part 654.

(b) *For States certifying on behalf of its subrecipients and their contractors*

I, (name, title) on behalf of (STATE) certify that the entities on the attached list of Federal Transit Act subrecipients operating in this State, have established and implemented alcohol misuse prevention programs in accordance with the terms of 49 CFR part 654.

II

The text of the certification of an employer that provides commuter rail transportation service regulated by the Federal Railroad Administration shall be as follows:

I, (name), (title), certify that (name of recipient) and its contractors, as required, for (name of recipient), has an alcohol misuse prevention program that meets the requirements of the Federal Railroad Administration's regulations for employees regulated by the Federal Railroad

Administration, and has established and implemented an alcohol misuse prevention program in accordance with the terms of 49 CFR part 654 for all other covered employees who perform safety-sensitive functions.

BILLING CODE 4910-57-P

**APPENDIX B TO PART 654 - ALCOHOL TESTING MANAGEMENT INFORMATION SYSTEM
(MIS) DATA COLLECTION FORM**

INSTRUCTIONS

The following instructions are to be used as a guide for completing the alcohol testing information in the Federal Transit Administration (FTA) Alcohol Testing MIS Data Collection Form. These instructions outline and explain the information requested and indicate the probable sources for this information. A sample testing results table with a narrative explanation is provided on pages iii-iv as an example to facilitate the process of completing the form correctly.

This reporting form includes six sections. Collectively, these sections address the data elements required in the FTA and the U.S. Department of Transportation (DOT) alcohol testing regulations. The six sections, the page number for the instructions, and the page location on the reporting form are:

<u>Section</u>	<u>Instructions Page</u>	<u>Reporting Form Page</u>
A. EMPLOYER INFORMATION	i	1
B. COVERED EMPLOYEES	i	2
C. ALCOHOL TESTING INFORMATION	ii-iv	3-4
D. OTHER ALCOHOL TESTING/PROGRAM INFORMATION	v	5
E. ALCOHOL TRAINING/EDUCATION	v	5
F. FTA FUNDING SOURCES	v	5

Page 1 **EMPLOYER INFORMATION** (Section A) requires the year covered by this report, the agency name for which the report is done, a current address, a person's name and phone number to contact if there are any questions about the report. Below this, information must be entered for the consortium used (if applicable). Finally, a signature, title and date are required certifying the correctness and completeness of the form. Note: A separate report must be submitted by each FTA recipient for each of its contract service and contract maintenance providers covered by the FTA alcohol testing regulation.

Page 2 **COVERED EMPLOYEES** (Section B) requires a count for each employee category that must be tested under the FTA alcohol testing regulation. The employee categories are: Revenue Service Vehicle Operation, Revenue Service Vehicle and Equipment Maintenance, Revenue Service Vehicle Control/Dispatch, Commercial Driver License (CDL) Holders who operate Non-Revenue Service Vehicles, and Security Personnel who carry Firearms. The most likely source for this information is the employer's personnel department. These counts should be based on the

recipient's or contractor's records for the reported year. The **TOTAL** is a count of all covered employees for all categories combined, i.e., the sum of the columns.

Page 3

ALCOHOL TESTING INFORMATION (Section C) requires information for alcohol testing by category of testing. All numbers entered into the pre-employment category section of the table should be separated into the category of employment for which the person was applying or transferring. The other categories are for employee testing and require information for employees in covered positions only. Each part of this table must be completed for each category of testing. These categories include: (1) random, (2) post-accident, (3) reasonable suspicion, (4) return to duty, and (5) follow-up testing. These numbers do not include refusals for testing. A sample section of the table with example numbers is presented on page iv.

Four types of information are necessary to complete this table. The first blank column with the heading "**NUMBER OF SCREENING TESTS**," requires a count for all screening tests conducted for each employee category. The second blank column with the heading "**NUMBER OF CONFIRMATION TESTS**," requires a count for all confirmation alcohol tests performed for each employee category.

The third blank column with the heading "**NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO 0.02, BUT LESS THAN 0.04**," requires a count for each employee category of completed alcohol tests that resulted in an alcohol concentration equal to or greater than 0.02, but less than 0.04.

The fourth blank column with the heading "**NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04**," requires a count for each employee category of completed alcohol tests that resulted in an alcohol concentration equal to or greater than 0.04. **Note:** For return to duty testing, a confirmation result equal to or greater than 0.02 is a violation of the alcohol rule. Therefore, if the number of results equal to or greater than 0.04 is unknown, you may report all results in the third column of the table.

Each column in the table should be added and the answer entered in the row marked "**TOTAL**".

A sample table is provided on page iv with example numbers.

Page 3

Below the part of the table containing pre-employment testing information are three boxes. This information should be available from the safety program manager or the alcohol program manager.

1) "Number of persons denied a position as a covered employee following a pre-employment alcohol test indicating an alcohol concentration of 0.04 or greater". This is a count of those persons who were not placed in a covered position because they took a breath test that resulted in an alcohol concentration of 0.04 or higher.

2) "Number of accidents, as defined by the FTA alcohol testing regulation, which resulted in a post-accident alcohol test indicating an alcohol concentration of 0.04 or greater". This is a count of fatal and non-fatal accidents which resulted in post-accident breath alcohol tests indicating a concentration of 0.04 or greater for any employees involved in the accident.

3) "Number of fatalities resulting from accidents which resulted in a post-accident alcohol test indicating an alcohol concentration of 0.04 or greater". This is a count of fatalities in accidents which resulted in post-accident alcohol tests indicating a concentration of 0.04 or greater for any employees involved in the fatal accidents.

Page 4

Following the table that summarizes **ALCOHOL TESTING INFORMATION**, you must provide the number of employees who engaged in alcohol misuse who were returned to duty in a covered position during this reporting period (having complied with the recommendations of a substance abuse professional as described in FTA regulations). This information should be available from the personnel office and/or alcohol program manager.

SAMPLE APPLICANT TEST RESULTS TABLE

The following example is for Section C, **ALCOHOL TESTING INFORMATION**, which summarizes pre-employment testing results. The procedures detailed here also apply to the other categories of testing in Section C which require you to summarize testing results for employees. This example uses the categories "Revenue Vehicle Operation" and "Armed Security Personnel" to illustrate the procedures for completing this section.

A

Screening tests were performed on 157 job applicants for revenue vehicle operator positions during the reporting year. This information is entered in the first blank column of the table in the row marked "Revenue Vehicle Operation".

B

Confirmation tests were necessary for 6 of the 157 applicants for revenue vehicle operator positions. Enter this information in the second blank column of the table in the row marked "Revenue Vehicle Operation". The confirmation test results for these 6 applicants were the following:

<u>Applicant</u>	<u>Confirmation Result</u>
#1	0.06
#2	0.01
#3	0.11
#4	0.04
#5	0.03
#6	0.02

C

The confirmation test results for 2 of the applicants for revenue vehicle operator positions were equal to or greater than 0.02, but less than 0.04. Enter this information in the fourth blank column of the table in the row marked "Revenue Vehicle Operation".

D

The confirmation test results for 3 of the applicants for revenue vehicle operator positions were equal to or greater than 0.04. Enter this information in the third blank column of the table in the row marked "Revenue Vehicle Operation".

E

The last row, marked "TOTAL", requires you to add the numbers in each of the columns. With this example, 157 applicants for revenue vehicle operator positions and 107 applicants for armed security personnel positions were subjected to screening tests. The total for that column would be 264 (i.e., $157 + 107$). The same procedure should be used for each column. (i.e., add all the numbers in that column and place the answer in the last row).

Please note that our sample data collection form also has information for armed security personnel on line two. The same procedures outlined for revenue vehicle operators should be followed for entering the data on armed security personnel. With applicants for armed security personnel positions, 107 screening tests were conducted resulting in 3 confirmation tests. No confirmation results were equal to or greater than 0.02, but less than 0.04; and the confirmation test result for 1 of the armed security personnel applicants was equal to or greater than 0.04. This information is entered in the row marked "Armed Security Personnel".

PRE-EMPLOYMENT				
EMPLOYEE CATEGORY	NUMBER OF SCREENING TESTS	NUMBER OF CONFIRMATION TESTS	NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04	NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04
Revenue Vehicle Operation	157	6	2	3
Armed Security Personnel	107	3	0	1
TOTAL	264	9	2	4

A
B
C
D
E

Note that adding up the numbers for confirmation results in columns three and four will not always match the number entered in the second column, "NUMBER OF CONFIRMATION TESTS". These numbers may differ since some confirmation test results may be less than 0.02.

Remember that the same procedures indicated above are to be used for completing all of the categories for testing in Section C.

Page 5 **OTHER ALCOHOL TESTING/PROGRAM INFORMATION** (Section D) requires information on employees tested for drugs and alcohol at the same time and that you complete a table dealing with violations of other alcohol provisions/prohibitions of the regulation and a table dealing with employees who refused to submit to an alcohol test.

Page 5 **Number of employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater**, requires that a count of all such employees be entered in the indicated box.

Page 5 **VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION** requires supplying the number of covered employees who used alcohol prior to performing a safety-sensitive function, while performing a safety-sensitive function, and before taking a required post-accident alcohol test. The action taken with covered employees who violate any of these FTA alcohol regulation provisions is also to be supplied. Other violations not delineated in this table may also be provided.

Page 5 **EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST** requires information on the **NUMBER OF COVERED EMPLOYEES** who refused to submit to a random or non-random (pre-employment, post-accident, reasonable suspicion, return to duty, or follow-up) alcohol test required under the FTA regulation.

Page 5 **ALCOHOL TRAINING/EDUCATION** (Section E) requires information on the number of supervisory personnel who have received alcohol training during the current reporting period.

Page 5 **FTA FUNDING SOURCES** (Section F) asks for the sources of FTA funds for your organization. Simply place a check mark by each applicable funding section.

For FTA Use Only

FTA ALCOHOL TESTING MIS DATA COLLECTION FORM

OMB No. 2132-0557

YEAR COVERED BY THIS REPORT: 19__

A. EMPLOYER INFORMATION

Name _____

Address _____

Contact _____

Phone _____

Consortium Used (if applicable)

Name _____

Address _____

Contact _____

Phone _____

I, the undersigned, certify that the information provided on this Federal Transit Administration Alcohol Testing Management Information System Data Collection Form is, to the best of my knowledge and belief, true, correct, and complete for the period stated:

Signature_____
Date of Signature_____
Title

Title 18, U.S.C. Section 1001, makes it a criminal offense subject to a maximum fine of \$10,000, or imprisonment for not more than 5 years, or both, to knowingly and willfully make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States.

The Federal Transit Administration estimates that the average burden for this report form is 8 hours. You may submit any comments concerning the accuracy of this burden estimate or any suggestions for reducing the burden to: Office of Safety and Security (TTS-3); Federal Transit Administration; 400 7th St., S.W.; Washington, D.C. 20590; OR Office of Management and Budget, Paperwork Reduction Project (2132-0557); Washington, D.C. 20503.

B. COVERED EMPLOYEES

COVERED EMPLOYEES	
EMPLOYEE CATEGORY	NUMBER OF FTA COVERED EMPLOYEES
Revenue Vehicle Operation	
Revenue Vehicle and Equipment Maintenance	
Revenue Vehicle Control/Dispatch	
CDL/Non-Revenue Vehicle	
Armed Security Personnel	
TOTAL	

READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:

1. All items refer to the **current reporting period only** (for example, January 1, 1994 - December 31, 1994).
2. This report is only for testing **REQUIRED BY THE FEDERAL TRANSIT ADMINISTRATION (FTA) AND THE U.S. DEPARTMENT OF TRANSPORTATION (DOT)**:
 - Results should be reported only for employees in **COVERED POSITIONS** as defined by the FTA alcohol testing regulation.
 - The information requested should only include testing for alcohol using the standard procedures required by DOT regulation 49 CFR Part 40.
3. Information on refusals for testing should only be reported in Section D ["OTHER ALCOHOL TESTING INFORMATION"]. Do not include refusals for testing in other sections of this report.
4. Complete all items; **DO NOT LEAVE ANY ITEM BLANK**. If the value for an item is zero (0), place a zero (0) on the form.

C. ALCOHOL TESTING INFORMATION

EMPLOYEE CATEGORY	NUMBER OF SCREENING TESTS	NUMBER OF CONFIRMATION TESTS	NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04	NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04
PRE-EMPLOYMENT				
Revenue Vehicle Operation				
Revenue Vehicle and Equipment Maintenance				
Revenue Vehicle Control/Dispatch				
CDL/Non-Revenue Vehicle				
Armed Security Personnel				
Total				
RANDOM				
Revenue Vehicle Operation				
Revenue Vehicle and Equipment Maintenance				
Revenue Vehicle Control/Dispatch				
CDL/Non-Revenue Vehicle				
Armed Security Personnel				
Total				
POST-ACCIDENT				
Revenue Vehicle Operation				
Revenue Vehicle and Equipment Maintenance				
Revenue Vehicle Control/Dispatch				
CDL/Non-Revenue Vehicle				
Armed Security Personnel				
Total				
Number of persons denied a position as a covered employee following a pre-employment alcohol test indicating an alcohol concentration of 0.04 or greater:				
Number of accidents, as defined by the FTA alcohol testing regulation, which resulted in a post-accident alcohol test indicating an alcohol concentration of 0.04 or greater:			FATAL	NON-FATAL
Number of fatalities resulting from accidents which resulted in a post-accident alcohol test indicating an alcohol concentration of 0.04 or greater:				

C. ALCOHOL TESTING INFORMATION (cont.)

EMPLOYEE CATEGORY	NUMBER OF SCREENING TESTS	NUMBER OF CONFIRMATION TESTS	NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04	NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04
REASONABLE SUSPICION				
Revenue Vehicle Operation				
Revenue Vehicle and Equipment Maintenance				
Revenue Vehicle Control/Dispatch				
CDL/Non-Revenue Vehicle				
Armed Security Personnel				
Total				
RETURN TO DUTY				
Revenue Vehicle Operation				
Revenue Vehicle and Equipment Maintenance				
Revenue Vehicle Control/Dispatch				
CDL/Non-Revenue Vehicle				
Armed Security Personnel				
Total				
FOLLOW-UP				
Revenue Vehicle Operation				
Revenue Vehicle and Equipment Maintenance				
Revenue Vehicle Control/Dispatch				
CDL/Non-Revenue Vehicle				
Armed Security Personnel				
Total				
Number of employees who engaged in alcohol misuse who were returned to duty in a covered position during this reporting period (having complied with the recommendations of a substance abuse professional as described in FTA regulations):				

D. OTHER ALCOHOL TESTING/PROGRAM INFORMATION

Number of employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater:	
---	--

VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION

NUMBER OF COVERED EMPLOYEES	VIOLATION	ACTION TAKEN
	Covered employee used alcohol while performing safety-sensitive function.	
	Covered employee used alcohol within 4 hours of performing safety-sensitive function.	
	Covered employee used alcohol before taking a required post-accident alcohol test.	

EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST**Number**

Covered employees who refused to submit to a random alcohol test required under the FTA regulation:

Covered employees who refused to submit to a non-random alcohol test required under the FTA regulation:

E. ALCOHOL TRAINING/EDUCATION**TRAINING DURING CURRENT REPORTING PERIOD****Number**

Supervisory personnel who have received at least 60 minutes of initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable alcohol use as required by FTA alcohol testing regulations:

F. FTA FUNDING SOURCES**FTA FUNDING SOURCES**

Check all sections that apply:

3

9

16(b)(2)

18

**APPENDIX C TO PART 654 - ALCOHOL TESTING MANAGEMENT INFORMATION SYSTEM
(MIS) "EZ" DATA COLLECTION FORM**

INSTRUCTIONS

The following instructions are to be used as a guide for completing the Federal Transit Administration (FTA) Alcohol Testing MIS "EZ" Data Collection Form. This form should only be used if there is no alcohol misuse to be reported by your company. These instructions outline and explain the information requested and indicate the probable sources for this information. This reporting form includes four sections. These sections address the data elements required in the FTA and the U.S. Department of Transportation (DOT) alcohol testing regulations.

SECTION A - EMPLOYER INFORMATION requires the year covered by this report, the agency name for which the report is done, a current address, and a person's name and phone number to contact if there are any questions about the report. Below this, information must be entered for the consortium used (if applicable). Finally, a signature, title, and date are required certifying the correctness and completeness of the form. Note: A separate report must be submitted by each FTA recipient for each of its contract service and contract maintenance providers covered by the FTA alcohol testing regulation.

SECTION B - COVERED EMPLOYEES requires a count for each employee category that must be tested under the FTA alcohol testing regulation. The employee categories are: Revenue Service Vehicle Operation, Revenue Service Vehicle and Equipment Maintenance, Revenue Service Vehicle Control/Dispatch, Commercial Driver License (CDL) Holders who operate Non-Revenue Service Vehicles, and Security Personnel who carry Firearms. The most likely source for this information is the employer's personnel department. These counts should be based on the recipient's or contractor's records for the reported year. The **TOTAL** is a count of all covered employees for all categories combined, i.e., the sum of the columns.

SECTION C - ALCOHOL TESTING INFORMATION requires information for alcohol testing, refusals for testing, and training/education. The first table requests information on the **NUMBER OF ALCOHOL SCREENING TESTS CONDUCTED** in each category for testing. All numbers entered into the pre-employment category section of the table should be separated into the category of employment for which the person was applying or transferring. The other categories are for employee testing and require information for employees in covered positions only. Enter the number of alcohol screening tests conducted by employee category for each category of testing. Testing categories include: (1) random, (2) post-accident, (3) reasonable suspicion, (4) return to duty, and (5) follow-up testing. Each column in the table should be added and the answer entered in the row marked "TOTAL".

Following the table that summarizes **ALCOHOL TESTING INFORMATION**, you must provide a count of employees who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in the FTA regulation). This information should be available from the personnel office and/or alcohol program manager.

EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST requires a count of the **NUMBER OF COVERED EMPLOYEES** who refused to submit to a random or non-random (pre-

employment, post-accident, reasonable suspicion, return to duty, or follow-up) alcohol test required under the FTA regulation.

ALCOHOL TRAINING/EDUCATION DURING CURRENT REPORTING PERIOD requires information on the number of supervisory personnel who have received alcohol training during the current reporting period.

SECTION D - FTA FUNDING SOURCES asks for the sources of FTA funds for your organization. Simply place a check mark by each applicable funding section.

For FTA Use Only

FTA ALCOHOL TESTING MIS "EZ" DATA COLLECTION FORM **OMB No. 2132-0557**
(No Alcohol Misuse)

YEAR COVERED BY THIS REPORT: 19__

A. EMPLOYER INFORMATION

Company Name	_____
Address	_____

Contact	_____
Phone	_____
Consortium Used (if applicable)	
Name	_____
Address	_____

Contact	_____
Phone	_____

I, the undersigned, certify that the information provided on the attached Federal Transit Administration Alcohol Testing Management Information System "EZ" Data Collection Form is, to the best of my knowledge and belief, true, correct, and complete for the period stated.

_____ Signature	_____ Date of Signature
_____ Title	

Title 18, U.S.C. Section 1001, makes it a criminal offense subject to a maximum fine of \$10,000, or imprisonment for not more than 5 years, or both, to knowingly and willfully make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States.

The Federal Transit Administration estimates that the average burden for this report form is 8 hours. You may submit any comments concerning the accuracy of this burden estimate or any suggestions for reducing the burden to: Office of Safety and Security (TTS-3); Federal Transit Administration; 400 7th St., S.W.; Washington, D.C. 20590; OR Office of Management and Budget, Paperwork Reduction Project (2132-0557); Washington, D.C. 20503.

B. COVERED EMPLOYEES

COVERED EMPLOYEES	
EMPLOYEE CATEGORY	NUMBER OF FTA COVERED EMPLOYEES
Revenue Vehicle Operation	
Revenue Vehicle and Equipment Maintenance	
Revenue Vehicle Control/Dispatch	
CDL/Non-Revenue Vehicle	
Armed Security Personnel	
TOTAL	

C. ALCOHOL TESTING INFORMATION

NUMBER OF ALCOHOL SCREENING TESTS CONDUCTED						
EMPLOYEE CATEGORY	PRE-EMPLOYMENT	RANDOM	POST-ACCIDENT	REASONABLE SUSPICION	RETURN TO DUTY	FOLLOW-UP
Revenue Vehicle Operation						
Revenue Vehicle and Equipment Maintenance						
Revenue Vehicle Control/Dispatch						
CDL/Non-Revenue Vehicle						
Armed Security Personnel						
Total						

Number of employees who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in the FTA regulation):

EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST	Number
Covered employees who refused to submit to a random alcohol test required under the FTA regulation:	
Covered employees who refused to submit to a non-random alcohol test required under the FTA regulation:	

ALCOHOL TRAINING/EDUCATION DURING CURRENT REPORTING PERIOD	Number
Supervisory personnel who have received at least 60 minutes of initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable alcohol use as required by FTA alcohol testing regulations:	

D. FTA FUNDING SOURCES

FTA FUNDING SOURCES				
Check all sections that apply:	3	9	16(b)(2)	18

Drug-Free Workplace Act

OFFICE OF MANAGEMENT AND BUDGET**Governmentwide Implementation of the Drug-Free Workplace Act of 1988**

AGENCY: Office of Management and Budget.

ACTION: Notice.

SUMMARY: This Notice provides information, in the form of nonbinding questions and answers, to assist the public in meeting the requirements of the Drug-Free Workplace Act of 1988. The Office of Management and Budget (OMB) coordinated regulatory development with over 30 Federal agencies to ensure uniform, governmentwide implementation of this Act. As a consequence, OMB is offering this governmentwide non-regulatory guidance.

Part of the omnibus drug legislation enacted November 18, 1988 is the Drug-Free Workplace Act of 1988 (Pub. L. 100-690, title V, subtitle D). This statute requires contractors and grantees of Federal agencies to certify that they will provide drug-free workplaces. Making the required certification is a precondition of receiving a contract or grant from a Federal agency after March 18, 1989.

Regulatory requirements pertaining to contractors are detailed in a final rule appearing in today's **Federal Register**. This rule amends the Federal Acquisition Regulation (FAR). Regulatory requirements pertaining to grantees are detailed in a final common rule also appearing in today's **Federal Register**. The preamble to the grantee common rule answers questions pertaining to grants or to contracts-and-grants, but does not address questions pertaining only to contracts.

FOR FURTHER INFORMATION CONTACT: For grants, contact Barbara F. Kahlow, Financial Management Division, OMB, (telephone 202-395-3053). For contracts, contact Robert Neal, Office of Federal Procurement Policy, OMB, (telephone 202-395-6810).

SUPPLEMENTARY INFORMATION:**Response to Questions**

See the common preamble to the grantee final common rule for detailed response to most questions on requirements on contractors and grantees.

1. Question—What is a minimum set of components for an employer program to meet the requirements of the Drug-Free Workplace Act?

Answer—Each employer must meet the specific requirements of the Act with a good faith effort, including having a

policy statement and a drug awareness program. Neither the law nor the final rules require employers to establish an Employee Assistance Program (EAP), to conduct any drug testing, or to incorporate any particular component in an employer's program.

2. Question—What are examples of other possible components of an employer drug-free workplace program for contractors and grantees?

Answer—Here is a partial list of other possible components of an employer program. The list is provided for information only; there is no intention for the Federal Government to require any particular component.

Employee Education

- Conduct education/outreach of employees/families via:
 - Discussion groups on drug abuse/company policy
 - Videotapes/pamphlets on drugs in workplace
 - Brown bag lunch discussions
 - Communication of available employee assistance
 - Communication of available health benefits for drug/alcohol treatment

Employee Assistance

- Establish an EAP
- Identify treatment resources
- Assemble resource file on providers of assistance
 - Provide problem assessments
 - Provide confidential counselling
 - Provide referral to counselling and/or treatment
 - Provide crisis intervention
 - Establish hot-line
 - Provide family support services
 - Conduct followup during and after treatment
 - Conduct evaluation of job performance pre- and post-program contact
 - Review insurance coverage (to include outpatient as well as inpatient treatment)
 - Institute mechanism to review employee complaints

Supervisory Training

- Conduct management/supervisory/union training on:
 - Drug Abuse education
 - Signs and symptoms of drug use
 - Company policy on drug use
 - Employee assistance resources
 - How to deal with an employee suspected of drug use
 - How and when to take disciplinary action

Drug Detection

- Institute a program of drug testing of:

- All employees—testing of applicants or pre-employment; testing of employees based on reasonable suspicion, post accident, during and after counselling and/or rehabilitation
- Employees in health and safety or national security sensitive positions—random unannounced testing

- Increase security

3. Question—What are examples of some model drug-free workplace programs?

Answer—Both the Department of Health and Human Services' National Institute on Drug Abuse (NIDA) and the U.S. Chamber of Commerce have identified several model programs. For further information on these or other models or on programs to combat drug abuse in the workplace, call the NIDA toll-free employer help-line on: 800-843-4971. NIDA also has a clearinghouse for general information on controlling alcohol and drug abuse. That number is 301-468-2600. The address of the National Clearinghouse for Alcohol and Drug Information is Box 2345, Rockville, MD 20852. Currently, the Federal Government does not have an example of a model program for a small employer.

Examples include the following:

A large chemical company—EAP contracted out, including: seminars, assessment, short-term counselling and referral, supervisory training, and followup monitoring; some local sites have drug testing for cause, post accident, and for safety-critical jobs.

A large automotive manufacturing company—EAP contracted out, including: crisis intervention and treatment for employees and immediate family, counselling, referral to counselors/therapists or inpatient/outpatient treatment; hotline; considering drug testing.

A major contractor—EAP for employees and their dependents, including: education, counselling, assessment, referral; hotline; management/supervisory training; alcohol/drug testing of applicants; alcohol/drug testing of employees based on reasonable suspicion or for cause; preventive alcohol/drug testing of corporate officers, employees in safety-sensitive or security-sensitive positions; inspections; trained dogs.

A mid-sized electrical company—EAP including counselling and management/supervisory training, drug testing of applicants and of employees for cause.

4. Question—Is the retail purchase of utility services by the Federal Government covered by the FAR and, therefore, subject to the Act?

Answer—Yes. Federal purchases of utility services are covered under subpart 8.3 of the FAR.

5. Question—Is an order issued pursuant to a basic ordering agreement covered by the FAR and, therefore, subject to the Act?

Answer—Yes. Basic ordering agreements are covered under subpart 16.7 of the FAR. Orders exceeding \$25,000 issued under basic ordering agreements are subject to the Act.

6. Question—What are examples of Federal contracts that are not "procurement contracts"?

Answer—Contracts not covered by the FAR, e.g., any other acquisition contract for real or personal property or services not subject to the FAR. An example is contracts for obtaining goods and services for post exchanges on military bases.

7. Question—Are oil and gas leases with the Federal Government covered by the FAR?

Answer—No. These types of contracts are not covered under the FAR.

8. Question—Are contracts to buy timber from the Federal Government covered by the FAR?

Answer—No. These types of contracts are not covered by the FAR.

9. Question—Are FSLIC and FDIC contracts for deposit insurance covered by the FAR?

Answer—No. These types of contracts are not covered by the FAR.

10. Question—Does selling U.S. savings bonds or acting as a depository for the Department of the Treasury constitute a procurement contract?

Answer—No.

11. Question—Is the receipt of funds by an individual pursuant to an imprest fund transaction covered by the FAR?

Answer—Yes; however, the Act is not applicable because imprest fund transactions do not exceed the \$25,000 threshold.

12. Question—Is an order issued against a requirements contract or an indefinite quantity contract covered by the Drug-Free Workplace Act when the order is reasonably expected to exceed \$25,000?

Answer—Yes.

13. Question—If a single firm has several contracts that when added together total \$25,000 or more, is the firm subject to the Act?

Answer—No. A firm would be subject to the Act only if the value of a single contract is \$25,000 or more.

14. Question—Does the FAR, which is issued jointly by three agencies (the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration), apply to contract awards by other executive agencies?

Answer—Yes.

15. Question—Do Drug-Free Workplace Act requirements apply to subcontracts?

Answer—No.

16. Question—Under the Act, can an agency impose any additional requirements, beyond those in the common rule, on grantees?

Answer—No. Both the January 31, 1989, grantee interim final common rule and the grantee final common rule indicate that the grantee common rule is the sole authority for implementing the Act and that no separate agency guidance is authorized under the Act.

17. Question—What is section 5301 of the omnibus drug legislation and how will it be implemented?

Answer—Section 5301 of the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4310 (codified at 21 U.S.C. section 853a) is another, separate part of the omnibus drug legislation that included the Drug-Free Workplace Act of 1988. Section 5301 deals with denial of certain Federal benefits for persons convicted of drug offenses. Denial decisions are made by Federal and State judges. The Department of Justice will be directing implementation. Questions should be addressed to: Director, Drug Offense/Denial of Federal Benefits Project, Office of Justice Programs, Department of Justice, 633 Indiana Avenue, NW., Washington, DC 20531; telephone: 202-307-0630.

18. Question—How will the Drug-Free Workplace Act be enforced?

Answer—Under the Act, certifications are required from contractors and grantees. Also, as part of normal Federal contract and grant administration, compliance will be checked. Additionally, as part of normal Federal auditing, compliance will be checked. And, lastly, as part of grantees' Single Audits, compliance checking will be required. OMB's compliance supplements for State and local governments and for other entities will include a requirement for such compliance checking.

Dated: May 20, 1990.

Frank Hadsell,

Executive Associate Director.

[FR Doc. 90-12186 Filed 5-24-90; 8:45 am]

BILLING CODE 3110-01-M

Department of Agriculture**7 CFR PART 3017****Department of Energy****10 CFR PART 1036****Small Business Administration****13 CFR PART 145****National Aeronautics and Space Administration****14 CFR PART 1265****Department of Commerce****15 CFR PART 26****Department of State****22 CFR PART 137****International Development Cooperation Agency****Agency for International Development****22 CFR PART 206****Peace Corps****22 CFR PART 310****United States Information Agency****22 CFR PART 513****Inter-American Foundation****22 CFR PART 1006****African Development Foundation****22 CFR PART 1508****Department of Housing and Urban Development****24 CFR PART 24****Department of Justice****28 CFR PART 67****Department of Labor****29 CFR PART 96****Federal Mediation and Conciliation Service****29 CFR PART 1471****Department of the Treasury****31 CFR PART 19****Department of Defense****32 CFR PART 280****Department of Education****34 CFR PART 85****National Archives and Records Administration****36 CFR PART 1209****Department of Veterans Affairs****38 CFR PART 44****Environmental Protection Agency****40 CFR PART 32****General Services Administration****41 CFR PART 105-66****Department of the Interior****43 CFR PART 12****Federal Emergency Management Agency****44 CFR PART 17****Department of Health and Human Services****45 CFR PART 76****National Science Foundation****45 CFR PART 620****National Foundation on the Arts and the Humanities****National Endowment for the Arts****45 CFR PART 1154****National Endowment for the Humanities****45 CFR PART 1169****Institute of Museum Services****45 CFR PART 1185****ACTION****45 CFR PART 1229****Commission on the Bicentennial of the United States Constitution****45 CFR PART 2016****Department of Transportation****49 CFR PART 29****Government-Wide Requirements for Drug-Free Workplace (Grants)**

AGENCIES: Department of Agriculture, Department of Commerce, Department of Defense, Department of Education, Department of Energy, Department of Health and Human Services, Department of Housing and Urban Development, Department of the Interior, Department of Justice, Department of Labor, Department of State, Department of Transportation, Department of the Treasury, Department

of Veterans Affairs. ACTION, African Development Foundation, Agency for International Development, Commission on the Bicentennial of the United States Constitution, Environmental Protection Agency, Federal Emergency Management Agency, Federal Mediation and Conciliation Service, General Services Administration, Institute of Museum Services, Inter-American Foundation, National Aeronautics and Space Administration, National Archives and Records Administration, National Endowment for the Arts, National Endowment for the Humanities, National Science Foundation, Peace Corps, Small Business Administration, United States Information Agency.

ACTION: Final rule.

SUMMARY: The Drug-Free Workplace Act of 1988 requires that all grantees receiving grants from any Federal agency certify to that agency that they will maintain a drug-free workplace, or, in the case of a grantee who is an individual, certify to the agency that his or her conduct of grant activity will be drug-free. This government-wide rule is for the purpose of implementing the statutory requirements. It directs that grantees take steps to provide a drug-free workplace in accordance with the Act. The rule amends an interim final rule published January 31, 1989, in response to public comment.

DATES: This rule is effective July 24, 1990, except for the certification requirement of § _____.630 (c) and (d) for States and State agencies which is effective June 25, 1990. Compliance is authorized immediately. However, the Department of Education is required to submit the final rule to Congress for review. See Education's agency-specific preamble below.

FOR FURTHER INFORMATION CONTACT: See agency-specific preambles for the contact person for each agency.

SUPPLEMENTARY INFORMATION: As part of the omnibus drug legislation enacted November 18, 1988, Congress passed the Drug-Free Workplace Act of 1988 (Pub. L. 100-690, Title V, Subtitle D; 41 U.S.C. 701 *et seq.*). This statute requires contractors and grantees of Federal agencies to certify that they will provide drug-free workplaces; or, in the case of a grantee who is an individual, certify to the agency that his or her conduct of the grant will be drug-free. Making the required certification is a precondition for receiving a contract or grant from a Federal agency.

The Federal agencies published an interim final rule on this subject January

31, 1989 (53 FR 4946), requesting public comments on it. The requirements of the interim final rule became applicable on March 18, 1989. The agencies received 95 comments, which they have reviewed. The responses to the comments are discussed below.

Drug-free workplace requirements pertaining to contractors will be found in a separate final rule amending the Federal Acquisition Regulation (FAR; 48 CFR subparts 9.4, 23.5, and 52.2). This government-wide common rulemaking concerns only grants (including cooperative agreements). This common rule will be the sole authority for implementing the Act, i.e., there will be no separate agency guidance issued. Because the statute makes use of existing suspension and debarment remedies for noncompliance with drug-free workplace requirements, the agencies have determined to implement the statute through an amendment to the existing government-wide nonprocurement suspension and debarment common rule. Using this vehicle will allow the agencies to take advantage of existing administrative procedures and definitions, minimizing regulatory duplication.

Section-By-Section Analysis

This portion of the preamble discusses the amendments made by this rule to the interim final government-wide drug-free workplace common rule as published on January 31, 1989. This section-by-section analysis does not attempt to describe the entire drug-free workplace rule, only those portions added or changed by this final rule.

Section _____ 605 Definitions

In the definition of "controlled substance," citations to regulations implementing the Controlled Substances Act have been corrected to refer to 21 CFR part 1308.

The definition of "employee" has been made more specific. An employee now includes all "direct charge" employees (i.e., those whose services are directly and explicitly paid for by grant funds) and "indirect charge" employees (i.e., those members of the grantee's organization who perform support or overhead functions related to the grant and for which the Federal Government pays its share of expenses under the grant program). (The terms "direct charge and indirect charge" come from cost principles in OMB Circular A-21, A-87, and A-122). Among indirect charge employees, those whose impact or involvement is insignificant to the performance of the grant are exempted from coverage.

Any other person who is on the grantee's payroll and works in any activity under the grant, even if not paid from grant funds, is also considered to be an employee. Temporary personnel and consultants who are on the grantee's payroll are covered. Similar workers who are not on the grantee's own payroll (e.g., who are on the payroll of contractors working for the grantee) are not covered, even if their physical place of employment is in the grantee's covered workplace. Likewise, volunteers, even if used to help meet a matching requirement, are not employees for purposes of this rule.

In the definition of "grant," editorial changes to the reference to the common rule on grants management were made. The definition of "grantee" specifies that a Federal agency that received a grant from another Federal agency is not considered a grantee for purposes of this rule. For convenience of parties that may use this rule but not the entire nonprocurement suspension and debarment rule, the definition of "State" from the suspension and debarment rule is repeated in this section. It emphasizes that State-supported institutions of higher education are not considered part of a "State" for purposes of the rule.

Section _____ 610 Coverage

Paragraph (b) of this section now provides that the agency head or his/her designee can determine that the application of this rule should be negated on the basis of inconsistency with U.S. international obligations or foreign law.

Section _____ 615 Grounds for Suspension of Payments, Suspension or Termination of Grants, or Suspension or Debarment

Since grants are often made to individuals (e.g., Pell Grants), a new paragraph (c) has been added to this section to specify the conduct by an individual grantee that constitutes a violation of the rule. (There is no similar provision in the drug-free workplace rule for contracting.) This conduct includes failing to carry out the requirements of the individual grantee's certification (e.g., by unlawful possession or use of a controlled substance during the conduct of any grant activity) or conviction of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity. The sanctions, set forth in § _____ 620, are the same as for other grantees. Paragraph (a), now limited to making a false certification, applies both to individual and other grantees. The former subparagraphs (b) and (c), which concern grantees other

than individuals, are now subparagraphs (1) and (2) of a new paragraph (b) concerning grantees other than individuals.

Section _____ 630 Certification Requirements and Procedures

This new section replaces the former § _____ 630 (Grantees' responsibilities) in its entirety. Paragraph (a) states the general rule that grantees must make the appropriate drug-free workplace certification as a prior condition to being awarded a grant. They need not do so, however, for a grant awarded before March 18, 1989, or under a no-cost time extension for such a grant. If there is a non-automatic continuation of such a grant that occurs after March 18, 1989, a one time certification is necessary. Non-automatic continuations are equivalent to competing continuations for many agencies.

As provided in paragraph (b), grantees must make the required certification for each grant as part of the grant application or if there is no application, prior to award. (For mandatory formula grants and entitlements with no application process, a one-time certification is needed to continue receiving awards.)

Paragraph (c) provides an opportunity for grantees that are States to make the certification to each Federal agency on an annual (Federal fiscal year) basis starting in Fiscal Year 1990, rather than on a grant-by-grant basis. Except as provided in paragraph (d), an annual State certification must cover all Federal agency grants to all State agencies. The original certification must be retained in the Governor's office. A copy must be sent with each grant to each Federal agency providing a grant to the State. A Federal agency may designate a central location for submission. For States that previously submitted an annual certification, statewide certification for Fiscal Year 1990 is required to be provided to Federal agencies no later than June 30, 1990.

Paragraph (d) establishes a variation on the statewide annual certification procedure of paragraph (c). Under this variation, the Governor may exclude certain State agencies from the statewide certification. Such certification would identify the excluded agencies. Each of the excluded agencies would then have the option to submit a single State agency certification to each Federal grant agency covering a Federal fiscal year. A State agency could also submit a single State agency certification in a case where there is no statewide certification. Otherwise, State

agencies will have to submit grant-by-grant certifications.

The original State agency certification is retained in the State agency's central office; a copy is submitted with each grant, unless the Federal agency has designated a central location for submission. The State agency certification is deemed to apply to all State agencies involved with the grant. If State agency X receives the grant, and part of the work is subgranted or subcontracted out to State agency Y, the workplaces and employees of the latter, as well as those of the former, are covered by the certification.

Paragraph (e) concerns the question of when the drug-free workplace policy statement and program promised in the certification must actually be in place. The certification promises that the policy statement and program will be in effect in the future; they do not need to be in place at the time of award. For a grant of 30 days or less in duration of performance, they must be in place as soon as possible, but in any case before performance is expected to be completed. For a grant of over 30 days in duration of performance, they must be in effect within 30 days of award. An agency may set a different compliance date where extraordinary circumstances warrant for a specific grant.

Section _____ 635 Reporting and Employee Sanctions for Convictions of Criminal Drug Offenses

This new section concerns requirements of employers and grantees who are individuals to report criminal drug offense convictions and the actions that employers are required to take concerning employees who are convicted of a criminal drug offense occurring in the workplace.

When a grantee other than an individual is notified by an employee, or learns from another source, that the employee has been convicted of a criminal drug offense occurring in the workplace, the grantee must provide, within 10 calendar days, a written notice of the conviction (including the employee's position title and grant identification number(s)) to the appropriate person or office in the Federal agency for each grant on which the convicted employee was working.

As with certifications, it is up to each Federal agency whether such reports are made to each grant officer or other official or to a central point in the agency. A grantee who is an individual who is convicted of a criminal drug offense while conducting grant activity must also make a written report of the conviction within 10 calendar days to the appropriate Federal agency official

or office. Sanctions for the individual grantee are as provided in § _____ 628.

When a grantee is notified that an employee has been convicted of a criminal drug offense for a violation occurring in the workplace, the grantee has 30 calendar days to take appropriate action. One type of action would be to require the employee to participate satisfactorily in an approved drug abuse assistance or rehabilitation program. Alternatively, the employer would take appropriate personnel action against the employee, up to and including termination. Terminating the employee is not mandatory under the rule; less stringent disciplinary action is permitted.

Whatever personnel action is taken must be consistent with section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794). This statute prohibits discrimination on the basis of handicap in programs receiving Federal financial assistance. As a general matter, a person may be a handicapped person protected by the Act on the basis of a "physical or mental impairment" that substantially limits a major life activity, such as working, including drug addiction or alcoholism (see for example 43 Op. Atty. Gen. 12 (1977), Department of Transportation rules at 49 CFR 27.5).

Under case law interpreting the Rehabilitation Act, a recovering substance abuser who is rehabilitated or undergoing rehabilitation would fall within the definition of a handicapped individual. It should be pointed out, however, that under the Rehabilitation Act (29 U.S.C. 706(7)(B)), the definition of a handicapped individual, for purposes of employment, does not include someone

whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

Appendix C

Instructions

This rule adds three new paragraphs to the instructions for the certification for grantees other than individuals. Paragraph eight repeats certain key definitions from the regulation (controlled substance, conviction, criminal drug statute, and employee) for the convenience of grantees. Paragraphs five, six and seven relate to the identification of workplaces. Federal agencies, in order to audit grantee compliance, must have access to the addresses or locations of workplaces to which drug-free workplace requirements

apply. Consequently, grantees must identify workplaces in one of three ways: (1) On the certification document, (2) on the grant application or in signing the award if there is no application, or (3) in a document kept on file and available for inspection by Federal agencies. The choice among these options is the grantee's. The identifications must include the street address or location of the workplace, where work will take place at a specific site or sites. In other situations, it may be necessary to use a categorical identification instead. For example, a mass transit authority could identify covered workplaces as including all buses and subway trains while in operation.

Certification for Grantees Other Than Individuals

Paragraph A(b) of this certification has been amended to specify that the grantee's drug-free awareness program must be an "ongoing" program. This means that this program cannot be a one-time effort at the outset of the grant, but must continue throughout the life of the grant. In addition to editorial changes, paragraphs (A) (d), (e) and (f) have been amended to specify that notices must be provided in writing and that deadlines are determined in calendar days. Reference to the notification requirement of § _____ 635(a)(1) has been added to paragraph A(e) and a reference to the Rehabilitation Act has been added to paragraph A(f)(1). Finally, paragraph B now says that the grantee "may" submit workplace identifications in the certification; the grantee, as explained in the instructions, may also do so at the time of grant application (or the time of award, if there is no application) or may keep the identifications on file.

Certification for Grantees Who Are Individuals

A new paragraph (b) has been added, incorporating the notice requirement of § _____ 635(b).

Response to Comments

The following portion of the preamble lists the issues raised by public comments to the docket for the January 31, 1989, interim final rule. The statement of each issue is followed by the agencies' response.

The Certification Process

1. All grantees (not just States) should be allowed to certify on an annual basis, rather than on a grant-by-grant basis.

Response: Under principles of Federalism, States occupy a special

position in the Federal system.

Moreover, States and State agencies receive substantial funding under many Federal programs, and have many continuing grant program relationships with Federal agencies. State governments are well situated to make comprehensive certifications for their State agencies. The Federal agencies have determined that annual certifications make sense as an option for the States. It is far less clear that such a system would be appropriate for other grantees. It should be noted that State-supported institutions of higher education are not considered to be "States" or State agencies for this or other purposes under the regulation. This means, for example, that a university could not submit a one-time certification for itself or for a particular agency or the entire State government.

2. The certification options available to grantees should be clarified.

Response: Section 630 of the common rule now provides that grantees shall make the required certification for each grant at the time of initial grant application or before award if there is no application. States may make a one-time annual certification; State agencies not covered by an annual statewide certification may make a one-time annual State agency-wide certification. However, a photocopy of the statewide or State agency-wide certification must accompany each grant, unless the Federal agency has established a central point for receiving certifications.

3. Add relevant definitions to the certification.

Response: Definitions of key terms, including controlled substance, conviction, criminal drug statute, and employee have been added to the certification. The definition of a controlled substance includes Schedule I-V substances under the Controlled Substances Act.

4. Work sites should not have to be identified in each certification, in order to reduce administrative burdens.

Response: The purpose of identification of work sites is to enable Federal agencies to determine whether grantees are complying with the regulation. To reduce administrative burdens, the revised rule allows grantees to choose whether to list work sites on the certification, in the grant application or award, or in a file maintained by the grantee available for Federal inspection.

5. Clarify that certification Alternate I is for grantees other than individuals and that Alternate II is for individuals.

Response: The titles of Alternates I and II now explicitly provide that they

are for grantees other than individuals and for grantees who are individuals, respectively.

6. Conditional certifications should be allowed.

Response: The Drug-Free Workplace Act does not allow for conditional certification. All grantees must certify that they will have a drug-free workplace.

7. Certifications should not be required for students in general, and recipients of Pell Grants in particular.

Response: The statute does not provide a basis on which student grantees can be exempted from the requirement that all grantees, including individuals, make a drug-free workplace certification. Making this certification will not add a significant burden to the student grant application process, and it is consistent with the intent of Congress that students, like other grantees, maintain a drug-free workplace.

8. Clarify whether certifications are needed for changes or modifications to grants awarded before March 18, 1989.

Response: In the case of a grant awarded prior to March 18, 1989, a certification is required only when there is a nonautomatic continuation award made after that date. That certification will be in effect through the end of the project period.

Scope of the Regulation

1. Requirements should not apply to local school districts or other educational organizations.

Response: The statute does not provide a basis on which school districts or other education-related grantees can be exempted from the requirements of the regulations.

2. Clarify whether any type of entity (e.g., banks, hospitals, institutions of higher education, local governments, utilities) is exempt from drug-free workplace requirements. What kind of grants do banks get that would be subject to these requirements?

Response: There are no exemptions for any type of organization. Banks may be more likely to get contracts (e.g., for debt collection, tax collection, or financial management services) than grants. Nevertheless, should a bank receive a grant, it would be subject to grant-related drug-free workplace requirements, whether or not it was also subject to these requirements as the result of having a contract with a Federal agency.

3. Clarify whether grants from such agencies as the U.S. Postal Service (USPS), the Tennessee Valley Authority (TVA), and the Legal Services

Corporation (LSC) trigger drug-free workplace requirements.

Response: Grants from TVA would do so; grants from USPS and LSC would not, because they are not executive branch agencies.

4. Clarify whether drug-free workplace requirements apply to subgrantees or contractors under grants, or to employees of contractors who work in a grantee's workplace.

Response: These requirements do not apply to subgrantees or contractors under grants, since the statute covers only parties who get grants directly from a Federal agency. For example, if a Federal agency provides grant funds to a State government, which in turn passes some of these funds to a local government, the State government is covered by these regulations and the local government is not. Employees of a subgrantee or contractor under a grant are not covered by the regulation, even if they work in a grantee's workplace. Of course, these rules do not preclude a grantee, acting on its own independent authority, from imposing additional requirements on subrecipients or contractors.

5. Clarify whether the receipt of free or subsidized space or utilities from a Federal agency is a grant subjecting the recipient to coverage under the regulation.

Response: Receipt of space or utilities (e.g., space used by enterprises operated by blind persons in Federal facilities) is not a grant subject to these regulations.

Drug-Free Policy Statement and Awareness Program

1. Grantees' drug-free awareness programs should be ongoing, not a one-time affair. Clarify whether employees need to be notified only once as part of the drug-free awareness program or with each grant.

Response: It is the intent of the regulations that the grantee's policy and program be a continuing effort. For clarity on this point, the regulation has been amended to specify that the grantee's program must be "ongoing." Consequently, while there is not a requirement that a grantee notify employees about their responsibilities each time a new grant is received, as such, the grantee's ongoing program must ensure that employees remain aware of their continuing responsibilities.

2. Clarify whether alcohol and nonprescription drug abuse must be a part of programs under this regulation.

Response: While grantees may include these subjects in their programs

at their own discretion, this regulation does not require their inclusion. For grantees' information, it is not essential to use the term "controlled substances" in the policy statement or program.

3. Clarify what responsibility employees or grantees have for reporting the use of controlled substances consistent with a legal prescription.

Response: Since the reporting requirements of the regulations pertain only to convictions for the unlawful use, possession, etc., of drugs occurring in the workplace, there is no reporting requirement in this situation.

4. The agencies should provide additional guidance or models for policy statements and drug awareness programs and sources of additional information about programs to combat drug abuse.

Response: The agencies believe that the requirements of the statute and regulation are very clear and explicit and that providing models is not necessary. It is preferable that individual grantees draft their own policies and create their own awareness programs, which can be better adapted to the needs of their workforces than any government-wide guidance. For grantees' information, the National Institute on Drug Abuse (NIDA) has a toll-free employer help-line for persons interested in programs to combat drug abuse in the workplace. The number is 800-843-4971. NIDA also has a clearinghouse for general information on controlling alcohol and drug abuse. That number is 301-468-2600. The address of the National Clearinghouse for Alcohol and Drug Information is Box 2345, Rockville, MD 20852.

5. Clarify whether grantees are required to establish an employee assistance program (EAP) or special training for supervisors.

Response: Nothing beyond the drug-free workplace policy statement and awareness program cited in the regulation is required. While grantees may voluntarily establish EAPs or special training for supervisors, doing so is not a requirement of this regulation.

6. The rules should define more specifically what constitutes a drug awareness program.

Response: The agencies believe that it is preferable to allow grantees to tailor programs to their needs. In addition, further specification could interfere with successful existing employer programs.

7. The regulation should allow the notice and policy statement to be given to a collective bargaining representative rather than to each employee individually.

Response: Under the statute and regulations, grantees are accountable for informing each employee of his or her responsibilities. This task cannot be delegated to a third party, such as a union. Nothing prevents the grantee from working cooperatively with a union to improve understanding of the grantee's policy and program among employees, however.

8. Clarify that employees are not required individually to verify receipt of the policy statement.

Response: We understand that some grantees have chosen to ask their employees to sign that they have received the statement. While grantees have the discretion to follow this practice, it is not required by the regulation.

9. Clarify whether drug testing is required or authorized under these regulations.

Response: The Act and these rules neither require nor authorize drug testing. The legislative history of the Drug-Free Workplace Act indicates that Congress did not intend to impose any additional requirements beyond those set forth in the Act. Specifically, the legislative history precludes the imposition of drug testing of employees as part of the implementation of the Act. At the same time, these rules in no way preclude employers from conducting drug testing programs in response to government requirements (e.g., Department of Transportation or Nuclear Regulatory Commission rules) or on their own independent legal authority.

10. Clarify when the drug-free awareness program required by the regulations must be in place.

Response: The statute and regulations do not require the program to be in place at the time of grant award. The certification is to the effect that such a program "will" be implemented (i.e., in the future). The agencies believe that grantees should have a reasonable time to get their program up and running. For a grant of 30 days or less duration, however, the program must be in place as soon as possible, but in any case before the performance of the grant is expected to be completed. To require less would be clearly contrary to the intent of Congress. Given that there is often some lag between the award of a grant and its performance, grantees for many short-duration grants should still have a reasonable amount of time after award to ensure that their program is in place. An agency may set a different compliance date where extraordinary circumstances warrant for a specific grant. For grants that will be performed

during a period of over 30 days, the program must be in place within 30 days of award.

Employees

1. Clarify whether all employees of a grantee are covered if only a few of the grantee's several divisions are involved with the grant.

Response: As noted above, persons on the grantee's payroll who work on any activity under the grant are covered. This includes both so-called "direct charge" (i.e., those whose services are directly and explicitly paid for from grant funds) and "indirect charge" (i.e., those persons who perform support or overhead functions related to the grant and for which the Federal agency pays its share of expenses under the grant program) employees. If a grantee has four operating divisions and a headquarters unit, and one division receives a Federal grant, then the employees of the one division receiving the grant who are directly engaged in the performance of work under the grant are covered, as well as headquarters employees that support the division's operations. However, these rules in no way preclude a grantee from electing to cover employees of other divisions.

2. Clarify whether temporary employees or volunteers are covered.

Response: Any person who works on any activity under the grant, and who is on the grantee's payroll, is considered to be a covered employee (except for an indirect charge employee whose impact or involvement is insignificant to the performance of a grant), even if not paid from grant funds. A temporary employee is covered if he or she meets these criteria. A volunteer is someone who is not on the grantee's payroll, and hence is not covered under the rule, even if used to help meet a matching requirement.

3. If convicted of a criminal drug offense resulting from a violation occurring in the workplace, employees are obligated to report the conviction to the grantee. Clarify whether employees also have an obligation to report co-workers' convictions to the grantee.

Response: Employees are required to report only their own convictions. Reporting co-workers' convictions is not required.

4. Clarify whether a grantee is required to take action with respect to an employee who is convicted of a criminal drug offense resulting from a violation occurring in the workplace, even if the information about the conviction comes from a source other than the employee's self-report.

Response: Under § _____ 635(a), the grantee's obligation to take action (either disciplinary action or referral for rehabilitation) arises when the grantee is "notified" of the conviction. This notification can come from any source (e.g., a newspaper report, contact from a probation officer, the employee's self-report).

5. The grantee's action with respect to a convicted employee should be determined on a case-by-case basis.

Response: The regulation requires only that, in case of a conviction for a criminal drug offense resulting from a violation occurring in the workplace, the grantee take one of two types of action. The grantee may take disciplinary action (which may be termination or a less severe sanction) or may refer the employee for a rehabilitation or drug abuse assistance program. The choice of which basic course to choose, as well as the specific discipline or treatment option, is left to the grantee's discretion and may be on a case-by-case basis.

6. Clarify that names of convicted employees need not be transmitted to the Federal agency.

Response: Notice is to be provided, including grant identification number(s) and position title, to the appropriate grant officer or office of the Federal agency. Language has been added to the certification for grantees other than individuals to make this point.

7. Clarify that employer obligations to inform employees of potential action against them include only those actions specified under this rule and not other Federal, State, or local laws.

Response: This statement is correct. While an employer may include other matters as part of the drug-free awareness policy, only the potential consequences of violations under this rule are required to be covered.

Enforcement and Sanctions

1. Clarify that agencies are not authorized to impose sanctions for employee convictions occurring before certifications are made.

Response: The grounds for sanctions under § _____ 615 include false certification, violation of a certification, and failing to make a good faith effort to provide a drug-free workplace (i.e., in response to the certification). None of these grounds for a sanction arise in the absence of a certification. Consequently, convictions occurring before a grantee ever made a certification would not be relevant to a determination concerning sanctions.

2. Clarify whether, after closeout on a grant but before final audit resolution,

grantees must report convictions of covered employees.

Response: Reporting of convictions is not required in this period.

3. The rule should allow reporting of convictions to a single agency to provide government-wide compliance with this requirement for all grants.

Response: If a given agency wishes to establish a central point for the reporting of convictions, it may do so. Requiring a central point for reporting to each agency, let alone the entire government, would be too cumbersome administratively and would not be consistent with the requirements of the Act. The same point applies to the submission of certifications to one government-wide point, which some commenters also requested.

4. Clarify to which Federal agencies grantees must report convictions of covered employees.

Response: Grantees (both individuals and others) must notify every grant officer on whose grant activity the convicted employee was working. If the employee was working on grants from more than one agency, then grant officers at all applicable agencies must be notified. Alternatively, if one or more of the agencies involved has designated a central point for the receipt of such notices, the grantee would notify the central point rather than the grant officer(s) in these agencies.

5. The rule should indicate the percentage of a grantee's employees that need to be convicted of criminal drug offenses for violations occurring in the workplace in order to trigger a finding that a grantee has failed to make a good faith effort to maintain a drug-free workplace. In any case, more guidance on what constitutes a good faith effort should be provided.

Response: The legislative history of the Act indicates that Congress did not believe that such a percentage trigger is appropriate. In determining whether the rule has been violated, an agency will look at the convictions and the efforts the grantee has made to maintain a drug-free workplace, deciding on a case-by-case basis whether the grantee has made a good faith effort. A numerical or percentage cutoff would not permit agencies to do justice to the variety of situations that may occur. Likewise, guidance on what constitutes a good faith effort would either be so general as to be of little use in particular situations or so specific as to unreasonably limit the necessary case-by-case judgments that agencies have the responsibility to make.

6. The evidentiary standard for imposing sanctions should be one of "substantial" evidence.

Response: The drug-free workplace requirements pertaining to grants do not independently state any such standard. Since the rules are part of the government-wide common rule for nonprocurement suspension and debarment, they use the same standards for imposing sanctions applicable to other nonprocurement suspension and debarment actions. The agencies do not believe that adopting a separate standard for drug-free workplace actions is appropriate or necessary.

7. Responsibility for making determinations about lack of good faith or other grounds for violations of the rule should be delegated to agency suspension and debarment officials.

Response: Section _____ 615 authorizes agency heads or their official designees to make determinations of violations. This language permits agency heads to delegate this responsibility. The regulation should not constrain the discretion of agency heads by automatically designating certain officials to perform this task.

8. Sanctions should be limited only to the transgressing workplace, not to other parts of the grantee's organization.

Response: The agencies do not believe that the regulation should contain such a limitation. If the grantee falsely certifies, fails to carry out the requirements of the certification, or fails to make a good faith effort to maintain a drug-free workplace, the grantee's overall management could be faulted for the violation, not only lower-level management at a particular site or facility. Responsibility for compliance goes all the way up an organization's chain of command, and agencies need to be able to apply sanctions accordingly.

9. The rule should provide that sanctions, and waivers of sanctions under § _____ 625, must be granted consistently and fairly by agencies.

Response: The agencies do not believe that there is a practical way of implementing this request. Agencies must deal with sanction and waiver issues on a case-by-case basis. Meaningful regulatory guidelines for agency action to this end would be very difficult to draft and implement, and could lead to unnecessary litigation.

10. Clarify whether benefits can be withheld from individual grantees.

Response: Section _____ 615 now specifies that individuals can violate the rule by falsely certifying, failing to carry out the requirements of the certification, or being convicted of a criminal drug

offense resulting from a violation occurring during the conduct of any grant activity. Like other grantees, grantees who are individuals are subject to sanctions (e.g., suspension or termination of the grant, debarment) if they violate the rule. As discussed in § _____.605(b), veterans' benefits are not subject to sanctions under this rule.

11. Clarify that a conviction includes acceptance of a guilty plea by a judicial body.

Response: It does.

12. The rule should make distinctions for severity of criminal statute violations.

Response: The Act, which speaks of convictions of a criminal drug offense, does not provide discretion to make such distinctions. However, grantees can take this information into account when developing their drug-free awareness programs or deciding on disciplinary actions.

13. Agencies should be permitted to grant a waiver of sanctions on the ground that sanctions would disrupt the operations of the agency.

Response: The rule permits waivers in the public interest, which is a sufficient basis for considering waivers. It is unlikely that there would be many circumstances in which sanctions to a grantee would disrupt the operations of the Federal agency making the grant, in any case.

14. The rule should delete the requirement to take corrective action for reported convictions within 30 days.

Response: This requirement is statutory and the rule cannot change it.

Relationship to Other Laws, Regulations and Agreements

1. Clarify whether the requirements of the Act and regulations preempt State and local laws.

Response: The requirements of the Act and regulations coexist with State and local law. We know of no conflicts with State or local law, so the question appears moot.

2. Clarify whether the requirements of the Act and regulations preempt collective bargaining agreements and inform grantees what to do about negotiations with unions about drug-free workplace requirements.

Response: These requirements coexist with the collective bargaining process. Compliance with the requirements of the Act and regulations is a condition of receiving a Federal grant. Preemption is not an issue. The Act and regulations do not purport to compel any change in existing labor-management agreements. Of course, labor and management cannot, via a collective bargaining

agreement, nullify a grant condition based on Federal law. Federal agencies are not compelled to provide grants to organizations that fail to comply with a statutorily-imposed grant condition, for whatever reason. However, where the regulations provide discretion to grantees about the mode of compliance with the regulations (e.g., a grantee may either take disciplinary action against an employee convicted of a criminal drug offense resulting from a violation occurring in the workplace or refer the employee for rehabilitation), labor and management may determine the mode of compliance through collective bargaining.

3. Clarify the relationship of the Act and regulations to tenure policies of institutions of higher education.

Response: There is no relationship between university tenure policies and these requirements. If a tenured faculty member is convicted of a criminal drug offense resulting from a violation occurring in the workplace, the university would be required to take disciplinary action against the faculty member or refer her or him for rehabilitation. Given the range of choice which the university has under this provision, nothing in the rule requires the university to take action inconsistent with its tenure policies.

4. Either agency heads or their designees should be able to make the determination concerning whether application of these rules would be inconsistent with international law or the laws of a foreign nation.

Response: The rule has been changed so that the designee of an agency head, as well as the agency head, may make this determination.

5. Clarify whether the rule is intended to preempt laws of other nations or international law, including with respect to privacy and confidentiality matters. There should be prior consultation with foreign governments about any regulatory requirements before the rules are applied to grants that may be performed abroad.

Response: For this Act, it has been determined that Federal law does not preempt the laws of other nations or international law, including with respect to employee confidentiality. Concerning prior consultation, neither the Act nor the Administrative Procedure Act allows special treatment for foreign governments in rulemaking.

6. The rule should provide protection to grantees from employee lawsuits or provide for Federal reimbursement from costs incurred in defending against such litigation.

Response: The statute does not immunize grantees from employee litigation and the agencies could not effectually create such protection in a regulation. Nor does the statute authorize the expenditure of Federal funds to reimburse grantees for the cost of defending such lawsuits.

7. Clarify the relationship between this rule and drug testing programs of the Department of Defense, Department of Transportation, and the Nuclear Regulatory Commission.

Response: The Department of Defense requires drug testing for certain employees of some defense contractors. If such a defense contractor also receives a grant from the Department of Defense or another Federal agency, the contractor would have to comply with both the Department of Defense requirements and these drug-free workplace rules.

The Department of Transportation and the Nuclear Regulatory Commission require drug testing for certain employees of employers in the industries they regulate. If one of these employers is also a grantee of a Federal agency, the employer would have to comply with both the Department of Transportation or Nuclear Regulatory Commission requirements and these drug-free workplace rules. Finally, various Federal agencies, including the Departments of Defense, Treasury and Transportation, require some of their own Federal employees (e.g., air traffic controllers) to be tested for drug use. These requirements are unrelated to any requirements for grantees under the Drug-Free Workplace Act.

Other Issues

1. Clarify what the "place of performance" of a grant means, particularly for activities that have no fixed location e.g., buses in a mass transit system).

Response: The place of performance is wherever activity under a grant occurs. It can be in a fixed location, a variety of locations, or no fixed location. For mass transit buses, for instance, the place of performance may be the transit authority's buses, wherever they are in operation. For grants for the arts, the places of performance may be the various concert halls, theaters, galleries, etc. at which the public views the performance or art work. General categorical descriptions of such workplaces may be listed by grantees.

2. Clarify whether the number of days employees and grantees have to make various notifications are calendar days or working days.

Response: The certification now specifies calendar days.

3. The notice of conviction from an employee to a grantee and a grantee to an agency should be in writing.

Response: The certification now so specifies.

4. The regulation should have more specific language concerning which costs related to a drug-free awareness program are allowable under a grant.

Response: Grantees should refer to applicable OMB Circulars A-21, A-87, and A-122 and Federal agency regulations for information on the allowability of costs. Cost allowability principles are the same for activities under these regulations as they are for expenditures needed to meet other grant conditions.

5. Clarify whether the rehabilitation of employees is an allowable cost under grants.

Response: Only the fair Federal share of the reasonable and necessary expenses for the rehabilitation or other treatment for covered employees would be allowable, consistent with OMB Circulars A-21, A-87, and A-122 and Federal agency regulations.

6. There should be a second opportunity for public comments after more experience under the rules.

Response: This suggestion, essentially a recommendation that the agencies issue another interim final rule, has not been adopted. The comments received in response to the interim final rule covered virtually all aspects of the rule, and the agencies have considered them fully and carefully. A second round of public comment would be likely to generate little additional useful comment and would only prolong uncertainty about the final shape of the regulations.

Regulatory Process Matters

This rule is a non-major rule under Executive Order 12291. The agencies have evaluated the rule under Executive Order 12612, pertaining to Federalism. The statute requires drug-free workplace certifications to be made by all grantees, including State agencies. The rule does reduce burdens on State grantees by allowing State agencies to elect an annual certification to each Federal grantor agency in lieu of a certification for every grant. For these reasons, the agencies have determined that the rule will not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment.

As a statutory matter, this rule must apply to all grantees, regardless of size. (The statute does provide a shorter, less burdensome certification to be made by

grantees who are individuals, however.) Costs incurred by grantees to implement drug-free workplace programs are directly mandated by statute; the agencies have minimal regulatory discretion in designing this regulation.

This rule contains information collection requirements subject to the Paperwork Reduction Act. The information collection requirements concern employees reporting drug offense convictions to grantees, grantees reporting these convictions to the agencies, and grantees listing the location(s) of their workplace(s) as part of the certification. These requirements have been reviewed and approved by the Office of Management and Budget, with OMB Control Number 0991-0002.

Text of the Common Rule

The text of the common rule, as adopted by the agencies in this document, appears below:

PART _____—GOVERNMENT-WIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENT-WIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

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Subpart F—Drug-Free Workplace Requirements (Grants)

Sec.

- _____ 600 Purpose.
- _____ 605 Definitions.
- _____ 610 Coverage.
- _____ 615 Grounds for suspension of payments, suspension or termination of grants, or suspension or debarment.
- _____ 620 Effect of violation.
- _____ 625 Exception provision.
- _____ 630 Certification requirements and procedures.
- _____ 635 Reporting of and employee sanctions for convictions of criminal drug offenses.

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Appendix C to Part _____ Certification Regarding Drug-Free Workplace Requirements

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Subpart F—Drug-Free Workplace Requirements (Grants)

§ _____ 600 Purpose.

(a) The purpose of this subpart is to carry out the Drug-Free Workplace Act of 1988 by requiring that—

(1) A grantee, other than an individual, shall certify to the agency that it will provide a drug-free workplace;

(2) A grantee who is an individual shall certify to the agency that, as a condition of the grant, he or she will not

engage in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in conducting any activity with the grant.

(b) Requirements implementing the Drug-Free Workplace Act of 1988 for contractors with the agency are found at 48 CFR subparts 9.4, 23.5, and 52.2.

§ _____ 605 Definitions.

(a) Except as amended in this section, the definitions of § _____ 105 apply to this subpart.

(b) For purposes of this subpart—

(1) *Controlled substance* means a controlled substance in schedules I through V of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15;

(2) *Conviction* means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

(3) *Criminal drug statute* means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

(4) *Drug-free workplace* means a site for the performance of work done in connection with a specific grant at which employees of the grantee are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance;

(5) *Employee* means the employee of a grantee directly engaged in the performance of work under the grant, including:

(i) All "direct charge" employees;

(ii) All "indirect charge" employees, unless their impact or involvement is insignificant to the performance of the grant; and,

(iii) Temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll.

This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces);

(6) *Federal agency or agency* means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency;

(7) *Grant* means an award of financial assistance, including a cooperative agreement, in the form of money, or property in lieu of money, by a Federal agency directly to a grantee. The term grant includes block grant and entitlement grant programs, whether or not exempted from coverage under the grants management government-wide common rule on uniform administrative requirements for grants and cooperative agreements. The term does not include technical assistance that provides services instead of money, or other assistance in the form of loans, loan guarantees, interest subsidies, insurance, or direct appropriations; or any veterans' benefits to individuals, i.e., any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States;

(8) *Grantee* means a person who applies for or receives a grant directly from a Federal agency (except another Federal agency);

(9) *Individual* means a natural person;

(10) *State* means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers the instrumentality to be an agency of the State government.

§ ____ 610 Coverage.

(a) This subpart applies to any grantee of the agency.

(b) This subpart applies to any grant, except where application of this subpart would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government. A determination of such inconsistency may be made only by the agency head or his/her designee.

(c) The provisions of subparts A, B, C, D and E of this part apply to matters covered by this subpart, except where specifically modified by this subpart. In the event of any conflict between provisions of this subpart and other provisions of this part, the provisions of this subpart are deemed to control with respect to the implementation of drug-free workplace requirements concerning grants.

§ ____ 615 Grounds for suspension of payments, suspension or termination of grants, or suspension or debarment.

A grantee shall be deemed in violation of the requirements of this subpart if the agency head or his or her official designee determines, in writing, that—

(a) The grantee has made a false certification under § ____ 630;

(b) With respect to a grantee other than an individual—

(1) The grantee has violated the certification by failing to carry out the requirements of subparagraphs (A.) (a)-(g) and/or (B.) of the certification (Alternate I to Appendix C) or

(2) Such a number of employees of the grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace.

(c) With respect to a grantee who is an individual—

(1) The grantee has violated the certification by failing to carry out its requirements (Alternate II to Appendix C); or

(2) The grantee is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity.

§ ____ 620 Effect of violation.

(a) In the event of a violation of this subpart as provided in § ____ 615, and in accordance with applicable law, the grantee shall be subject to one or more of the following actions:

(1) Suspension of payments under the grant;

(2) Suspension or termination of the grant; and

(3) Suspension or debarment of the grantee under the provisions of this part.

(b) Upon issuance of any final decision under this part requiring debarment of a grantee, the debarred grantee shall be ineligible for award of any grant from any Federal agency for a period specified in the decision, not to exceed five years (see § ____ 320(a)(2) of this part).

§ ____ 625 Exception provision.

The agency head may waive with respect to a particular grant, in writing, a suspension of payments under a grant, suspension or termination of a grant, or suspension or debarment of a grantee if the agency head determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

§ ____ 630 Certification requirements and procedures.

(a)(1) As a prior condition of being awarded a grant, each grantee shall make the appropriate certification to the Federal agency providing the grant, as provided in Appendix C to this part.

(2) Grantees are not required to make a certification in order to continue receiving funds under a grant awarded before March 18, 1989, or under a no-cost time extension of such a grant. However, the grantee shall make a one-time drug-free workplace certification for a non-automatic continuation of such a grant made on or after March 18, 1989.

(b) Except as provided in this section, all grantees shall make the required certification for each grant. For mandatory formula grants and entitlements that have no application process, grantees shall submit a one-time certification in order to continue receiving awards.

(c) A grantee that is a State may elect to make one certification in each Federal fiscal year. States that previously submitted an annual certification are not required to make a certification for Fiscal Year 1990 until June 30, 1990. Except as provided in paragraph (d) of this section, this certification shall cover all grants to all State agencies from any Federal agency. The State shall retain the original of this statewide certification in its Governor's office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency has designated a central location for submission.

(d)(1) The Governor of a State may exclude certain State agencies from the statewide certification and authorize these agencies to submit their own certifications to Federal agencies. The statewide certification shall name any State agencies so excluded.

(2) A State agency to which the statewide certification does not apply, or a State agency in a State that does not have a statewide certification, may elect to make one certification in each Federal fiscal year. State agencies that previously submitted a State agency certification are not required to make a certification for Fiscal Year 1990 until June 30, 1990. The State agency shall retain the original of this State agency-wide certification in its central office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency designates a central location for submission.

(3) When the work of a grant is done by more than one State agency, the

certification of the State agency directly receiving the grant shall be deemed to certify compliance for all workplaces, including those located in other State agencies.

(e)(1) For a grant of less than 30 days performance duration, grantees shall have this policy statement and program in place as soon as possible, but in any case by a date prior to the date on which performance is expected to be completed.

(2) For a grant of 30 days or more performance duration, grantees shall have this policy statement and program in place within 30 days after award.

(3) Where extraordinary circumstances warrant for a specific grant, the grant officer may determine a different date on which the policy statement and program shall be in place.

§ 635 Reporting of and employee sanctions for convictions of criminal drug offenses.

(a) When a grantee other than an individual is notified that an employee has been convicted for a violation of a criminal drug statute occurring in the workplace, it shall take the following actions:

(1) Within 10 calendar days of receiving notice of the conviction, the grantee shall provide written notice, including the convicted employee's position title, to every grant officer, or other designee on whose grant activity the convicted employee was working, unless a Federal agency has designated a central point for the receipt of such notifications. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

(2) Within 30 calendar days of receiving notice of the conviction, the grantee shall do the following with respect to the employee who was convicted.

(i) Take appropriate personnel action against the employee, up to and including termination, consistent with requirements of the Rehabilitation Act of 1973, as amended; or

(ii) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

(b) A grantee who is an individual who is convicted for a violation of a criminal drug statute occurring during the conduct of any grant activity shall report the conviction, in writing, within 10 calendar days, to his or her Federal agency grant officer, or other designee, unless the Federal agency has designated a central point for the receipt

of such notices. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

(Approved by the Office of Management and Budget under control number 0991-0062.)

Appendix C to Part — Certification Regarding Drug-Free Workplace Requirements

Instructions for Certification

1. By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.

2. The certification set out below is a material representation of fact upon which reliance is placed when the agency awards the grant. If it is later determined that the grantee knowingly rendered a false certification, or otherwise violates the requirements of the Drug-Free Workplace Act, the agency, in addition to any other remedies available to the Federal Government, may take action authorized under the Drug-Free Workplace Act.

3. For grantees other than individuals, Alternate I applies.

4. For grantees who are individuals, Alternate II applies.

5. Workplaces under grants, for grantees other than individuals, need not be identified on the certification. If known, they may be identified in the grant application. If the grantee does not identify the workplaces at the time of application, or upon award, if there is no application, the grantee must keep the identity of the workplace(s) on file in its office and make the information available for Federal inspection. Failure to identify all known workplaces constitutes a violation of the grantee's drug-free workplace requirements.

6. Workplace identifications must include the actual address of buildings (or parts of buildings) or other sites where work under the grant takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

7. If the workplace identified to the agency changes during the performance of the grant, the grantee shall inform the agency of the change(s), if it previously identified the workplaces in question (see paragraph 5e).

8. Definitions of terms in the Nonprocurement Suspension and Debarment common rule and Drug-Free Workplace common rule apply to this certification. Grantees' attention is called, in particular, to the following definitions from these rules:

"Controlled substance" means a controlled substance in Schedules I through V of the Controlled Substances Act (21 U.S.C. 812) and as further defined by regulation (21 CFR 1308.11 through 1308.15);

"Conviction" means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

"Criminal drug statute" means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

"Employee" means the employee of a grantee directly engaged in the performance of work under a grant, including: (i) All "direct charge" employees; (ii) all "indirect charge" employees unless their impact or involvement is insignificant to the performance of the grant; and, (iii) temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll. This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the grantee's payroll; or employees of subrecipients or subcontractors in covered workplaces).

Certification Regarding Drug-Free Workplace Requirements

Alternate I. (Grantees Other Than Individuals)

A. The grantee certifies that it will or will continue to provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing an ongoing drug-free awareness program to inform employees about—

(1) The dangers of drug abuse in the workplace;

(2) The grantee's policy of maintaining a drug-free workplace;

(3) Any available drug counseling, rehabilitation, and employee assistance programs; and

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will—

(1) Abide by the terms of the statement; and

(2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;

(e) Notifying the agency in writing, within ten calendar days after receiving notice under subparagraph (d)(2) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to every grant officer or other designee on whose grant activity the convicted employee was working, unless the Federal agency has designated a central point for the receipt of such notices. Notice shall

include the identification number(s) of each affected grant:

(f) Taking one of the following actions, within 30 calendar days of receiving notice under subparagraph (d)(2), with respect to any employee who is so convicted—

(1) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e) and (f).

B. The grantee may insert in the space provided below the site(s) for the performance of work done in connection with the specific grant:

Place of Performance (Street address, city, county, state, zip code)

Check ☐ if there are workplaces on file that are not identified here.

Alternate II. (Grantees Who Are Individuals)

(a) The grantee certifies that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant:

(b) If convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity, he or she will report the conviction, in writing, within 10 calendar days of the conviction, to every grant officer or other designee, unless the Federal agency designates a central point for the receipt of such notices. When notice is made to such a central point, it shall include the identification number(s) of each affected grant.

Adoption of the Common Rule

The text of the common rule, as adopted by the agencies in this document, appears below.



DEPARTMENT OF TRANSPORTATION

49 CFR Part 29

RIN 2105-AB64

FOR FURTHER INFORMATION CONTACT:

Robert C. Ashby, 202-366-9306.

List of Subjects in 49 CFR Part 29

Debarment and suspension (nonprocurement), Drug abuse, Grant programs.

Title 49 of the Code of Federal Regulations is amended as set forth below.

Samuel K. Skinner,

Secretary of Transportation.

Accordingly, the interim final rule amending 49 CFR part 29 which was published at 54 FR 4947 on January 31, 1989, is adopted as a final rule with the following changes:

PART 29—GOVERNMENT-WIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENT-WIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

1. The authority citation for part 29 continues to read as follows:

Authority: E.O. 12549; sec. 5151-5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690, title V, subtitle D; 41 U.S.C. 701 et seq.); 49 CFR part 322.

2. Subpart F and Appendix C to part 29 are revised to read as set forth at the end of the common preamble.

Subpart F—Drug-Free Workplace Requirements (Grants)

Sec.

- 29.600 Purpose.
29.605 Definitions.
29.610 Coverage.

Sec.

- 29.615 Grounds for suspension of payments, suspension or termination of grants, or suspension or debarment.
29.620 Effect of violation.
29.625 Exception provision.
29.630 Certification requirements and procedures.
29.635 Reporting of and employee sanctions for convictions of criminal drug offenses.
* * *

Appendix C to Part 29—Certification Regarding Drug-Free Workplace Requirements

Cross Reference: See also Office of Management and Budget notice published at 55 FR —, May 25, 1990.

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